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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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# No. 115

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LUCKENBACH TERMINALS, INC., A CORPORATION OF THE STATE OF NEW JERSEY,

*Petitioner,*

*vs.*

THE TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY, NEW JERSEY JUNCTION RAILROAD COMPANY, A CORPORATION OF NEW JERSEY, THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION, AND COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY.

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## STATEMENT AS TO JURISDICTION.

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The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Sec. 237 (a) of the Judicial Code (28 U. S. C. A. Sec. 344 (a)).

The final decree of the New Jersey Court of Errors and Appeals (hereinafter referred to as the Appellate Court), the highest court of the State of New Jersey in which a

decision in the suit could be had, was entered on January 25, 1940 (R. —). Application for appeal is herewith presented on the 11th day of April, 1940.

The statute of New Jersey, the validity of which has been drawn in question, is Chapter 121 of the Laws of New Jersey for the year 1919, pages 285 to 287 (hereinafter referred to as the Apportionment Act), as amended by Chapter 335 of the Laws of New Jersey for the year 1933, page 879, and the same laws as reenacted as Secs. 54: 7-1 to 7-8 and 2:221-40 of the Revised Statutes of New Jersey, 1937, and as so amended, is quoted as follows:

"1. Any municipal assessment, charge or lien against any parcel of real estate may be apportioned among proper sub-divisions of such parcel by the governing body of the municipality in which such parcel is located.

2. The assessments, charges or liens which may be so apportioned shall include any assessment for taxes, any assessment for benefits for local improvements, and any other municipal charge which is or may become a lien upon real estate, and which is or may become due and payable to the municipality, including the claim of the municipality under any sale for the enforcement of taxes or other municipal liens or charges.

3. The apportionment shall be made on the written application of any person interested, or on motion of said governing body without application.

4. The apportionment shall be made according to the values of the respective sub-divisions at the time the respective charges were levied or imposed, unless the claim is justly chargeable only to a particular part of such parcel.

5. Such governing body may make the apportionment by resolution. A copy of the apportionment shall be filed with the clerk and with the collecting officer of the municipality, and the charge as apportioned to each

subdivision shall then be a charge or lien thereon, in the same manner as if originally so assessed or imposed.

6. Such apportionment may be made without notice to the interested parties, but in such case any interested party who did not waive notice may apply for a reapportionment on notice; on such reapportionment, if a sum is apportioned to any subdivision in excess of the former apportionment, the amount of such excess shall be abated and lost to the municipality.

7. Notice under the foregoing section shall state the time and place of hearing on such application, and shall be given at least one week in advance by publication in a newspaper in which ordinances of said municipality may be published, and by personal service of a copy of such notice on each person interested who resides in the municipality.

8. Such governing body, either in a particular case or by standing resolution, may direct such apportionment to be made by any municipal official, and may impose such lawful regulations as the resolution shall provide.

9. Any such governing body or authorized officer may refuse to comply with any application for apportionment or reapportionment, unless the written application shall be accompanied by a map showing the entire parcel and the subdivisions desired, and shall also be accompanied by the deposit of a sum sufficient to cover the expense of the notice and advertisement hereinbefore provided, and to pay the estimated amount apportionable to the subdivisions in which the applicant is interested.

10. This act shall take effect immediately."

Sec. 6 thereof provides that "apportionment may be made without notice to interested parties", and petitioner claims that that clause renders the entire Apportionment Act unconstitutional under the "due process of law" clause con-

tained in Sec. 1 of the Fourteenth Amendment to the Constitution of the United States. In *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333, this Court, in reviewing a tax assessment said:

> "That if the state statute did not provide for a notice in any form, it was repugnant to the Fourteenth Amendment to the United States Constitution, and that it is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute."

The decision of the Appellate Court appears to be based upon non-Federal grounds, that are not independent and are wholly inadequate and untenable to support its decree and have no fair or substantial basis; and this Court has jurisdiction.

This case also challenges the validity of the tax sale based on such apportionment and presents to this Court, for the first time, the question whether an owner of real estate in New Jersey who has not waived notice of an apportionment, is not entitled, under the "due process of law" clause in the 14th Amendment to the Constitution of the United States, to a notice of an apportionment of taxes levied against such real estate.

This Court has held that a State court, by resting its judgment upon some ground of general law, cannot defeat its jurisdiction if a Federal right was specially set up or claimed, which, if recognized and enforced, would require a different judgment. *Chicago, B. & Q. Ry. Co.* v. *Illinois*, 200 U. S. 561, 580, 581. Whether a Federal right has been denied, or not given due recognition, by the Appellate Court is a question as to which petitioner is entitled to invoke the judgment of this Court. *Love* v. *Griffith*, 266 U. S. 32, 33. A Federal right having been properly urged in this case,

it is within the province of this Court to inquire, not only whether such right was denied in express terms, but also whether it was denied in substance and effect by putting forward non-Federal grounds of decision that are wholly inadequate and without any fair or substantial support. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164; *Ward* v. *Love County*, 253 U. S. 17, 22; *Broad River Power Company* v. *South Carolina*, 281 U. S. 537, 540. If the decision rests upon an unfair and unsubstantial basis, without fair support, constitutional obligations may not be evaded. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co., supra.* Because if non-Federal grounds of decision, plainly untenable, may thus be put forward successfully by the Appellate Court, this Court's power to review might easily be avoided. *Ward* v. *Love County, supra; Terre Haute & I. R. Co.* v. *Indiana*, 194 U. S. 579, 589.

It is respectfully submitted that the asserted non-Federal grounds of decision in this case are wholly inadequate and have no fair or substantial basis, and that this Court has jurisdiction.

The admitted facts are as follows:

In 1920, the petitioner, Luckenbach Terminals, Inc., a corporation of the State of New Jersey, complainant, in the court of chancery of New Jersey (hereinafter referred to as the Trial Court) and the appellant in the Appellate Court, became the owner of record of about 20 acres of unimproved waterfront situated on the westerly side of the Hudson River in New Jersey, and lying partly in the Township of North Bergen (hereinafter referred to as the Township), and partly in the County of Bergen (R. 312 to 319, Ex. C11, par. 1 of Bill R. 16 and 17; admitted R. 101). This tract included a strip of unimproved land about 1010 feet long and from 5 to 8 feet wide and of equal value through-

out lying in Hudson County between the easterly side of the Hoboken and Hudson River Turnpike and the original high water line of the river (hereinafter referred to as the Riparian Tract), and was assessed for taxes by the Township for each of the years 1930 to 1933 as Lot 4-A, in Block 438-C, at a valuation of $500.00 per foot of frontage on the river, or $505,000.00 (R. 17 and 18; admitted R. 101). On January 19, 1931, the Board of Commerce and Navigation of New Jersey granted a permit in writing to the petitioner to fill in the submerged lands lying in front of its holdings, from the original high water line out to the bulkhead line, on condition that the granting of the permit would in no way change or affect the title of the State to, or the character of, the lands lying under water upon which such fill should be placed (R. 19; admitted R. 101 and 321 to 323; Ex. C. 12). In compliance with this permit, the petitioner, by October, 1935, had gradually filled in about 6 acres of submerged lands (R. 19, 40; Admitted 101 and Ex. C. F.). Prior to the year 1932, the county determined to build a new highway traversing from south to north the part of the 20 acres lying in Hudson County, which would require the elimination of the turnpike, and the county also entered into an oral agreement with the petitioner and a written agreement with the defendant-respondent railroad companies (hereinafter referred to as the Railroad Companies) whereby the turnpike would be abandoned and the old right of way of the Railroad Companies would be transferred riverward and such conveyances would be severally made by each of such three principal parties to the others as should be found necessary for the carrying out of the plan, and the county also agreed with petitioner, *inter alia*, that it would assume and pay the proportion of the unpaid taxes that had been, and would be, assessed against the Riparian Tract for the years 1930 to 1933 by the township as should be fairly chargeable against the part thereof to be conveyed

by the petitioner to the Railroad Companies and would pay the expense of the removal of the right of way of the Railroad Companies and of the rebuilding of such right of way and of the transfer to the new site (R. 19, 20; Admitted 101). The county and Railroad Companies in the year 1932 entered into an agreement in writing which provided, *inter alia*, that the county would at its own expense acquire and convey to the Railroad Companies, by warranty deed, without cost to them, a good and sufficient title in fee simple, free from encumbrances, except such rights therein as were reserved to the petitioner, to a lot of land including such part of the Riparian Tract as should be needed for the new roadbed (R. 21; Admitted 102, 300; Sec. 4 of Ex. C7). On or about July 5, 1933, the office of the Engineer of Hudson County made a *verbal* application to the Commissioners of the Township for an apportionment of the unpaid taxes assessed against the Riparian Tract, and on July 5, 1933, a resolution in writing was adopted by three of the commissioners apportioning the unpaid taxes upon the Riparian Tract so that the southerly three-fifths part thereof carried a valuation of $9,000.00 per year and the northerly two-fifths part thereof a valuation of $496,000.00 per year, instead of $303,000 per year to the southerly three-fifths part and $202,000.00 per year to the northerly two-fifths part (R. 42, 43; Admitted R. 104, Ex. G). No notice of said apportionment was given petitioner for nearly nine months and then only by sending to it amended tax bills, during which time petitioner had informed the Railroad Companies that instead of conveying to the county and the county conveying to the Railroad Companies, it would convey directly to them, and instead of a fee the conveyance would be of a perpetual and exclusive easement for railroad purposes only (R. 23; Admitted 104; 241 to 255; Ex. C2). The conveyances were made on March 8, 1934 (R. 23; Admitted 104, 242, Ex. C2, R. 256 to 269, Ex. C3; R. 270 to 278, Ex.

C4; R. 278 to 287, Ex. C5; R. 288 to 296, Ex. C6). On September 12, 1935, the northerly two-fifths part of the Riparian Tract, known after the apportionment as Lot 4 A B, the ownership whereof had been retained by the petitioner, was sold by the Collector of Taxes for the Township for the apportioned taxes unpaid thereon for the years 1930 to 1933 and the unapportioned taxes of 1934, amounting all told to $172,856.59, and the township became the purchaser (Ex. C17; R. 332, 333; R. 26; Admitted 104).

The uncontroverted testimony of one of the firm of lawyers at that time representing the petitioner, is that he saw on February 25, 1937, in the office of the Hudson County Board of Taxation a certified copy of the resolution made for the apportionment, and the further uncontroverted testimony in the case is that the information contained in that certified copy was at once imparted to the officers of the petitioner and proceedings were forthwith instituted by it in the New Jersey Supreme Court for a writ of *certiorari* (R. 191, 192, 198).

The law under which said apportionment was made is Ch. 121 of the laws of New Jersey for the year 1919, entitled "An Act for the apportionment of assessments for taxes and other municipal assessments, charges or liens, "as amended by Ch. 335 of the laws of New Jersey for the year 1933, p. 879 (R. 29; Admitted R. 104).

Other admitted facts are that in order to convey a perpetual easement in a parcel of land of a width of 54 feet to the Railroad Companies it became necessary for petitioner to first acquire from the State of New Jersey a triangular shaped tract of the land that had been filled in and which was treated as submerged lands and which was 48 feet wide at its southerly end and ran northerly about 620 feet to a point, and the conveyance of which was delivered to petitioner on March 8, 1934, nearly nine months after the apportionment, and the easement wherein was conveyed

the same day by the petitioner to the Railroad Companies (R. 278 to 287; R. 22; Admitted R. 103). Said tract included a five foot in width riparian fringe along its riverward side, which was retained by the petitioner when it conveyed to the Railroad Companies in order to preserve in it the preferential privilege of acquiring the adjacent lands lying under water (R. 22; Admitted 103). Prior to this last mentioned conveyance this triangular tract formed part of the lands owned by the State of New Jersey and while so owned it was not assessable for taxes by the Township, *State, Winants* v. *Jersey City*, 42 N. J. L. 349. Therefore, it had never been assessed for taxes, and not having been conveyed until nearly nine months after the apportionment had nothing to do therewith, because Chapter 208 of the General Tax Act of 1903 of New Jersey provides, in Sec. 31, "that in making apportionments the lands shall be assessed in accordance with the values thereof when the taxes come due". The State Supreme Court treated the triangular shaped parcel and the five foot riparian fringe as though they had been owned by petitioner at the time of the apportionment, as shown by its opinion (118 N. J. L. 348), whereas it did not acquire them until nearly nine months after the apportionment, and this was alleged in Paragraph 12 of the bill and admitted at the trial (R. 22, par. 12; Admitted R. 103).

On March 11, 1937, which was within the eighteen months limited after a tax sale for bringing proceedings to obtain a *certiorari* to review such sale (ch. 21 of Laws of N. J. of 1925), the petitioner made application, on affidavits only, to the Chief Justice of the Supreme Court of New Jersey for a writ of *certiorari* to set aside the tax sale and apportionment, and was granted a rule to show cause made on that day (R. 33, Par. 43 of bill; Admitted R. 104), and on page 5 of the brief submitted to the justices of the

State Supreme Court, Sec. 6 of the Apportionment Act, which petitioner contends renders the whole Apportionment Act repugnant to the "due process of law" clause contained in Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, was quoted, and on the argument for the writ, petitioner's counsel also claimed that the Apportionment Act was unconstitutional under that Sec. 1. The opinion of the State Supreme Court (reported in 118 N. J. L. 348), does not mention the constitutional question thus raised and the justices declined to issue the writ, although they allowed a writ as to another part of the 20 acres of land belonging to petitioner. The finding was that the apportionment was not unfair to petitioner and that petitioner had been guilty of such *laches* in bringing the proceedings that no writ of *certiorari* could issue (R. 33 and 34). Under the practice in New Jersey, as laid down by its highest court, a refusal by the State Supreme Court to grant a writ of *certiorari* is a discretionary matter from which no appeal can be taken and is not a final judgment nor *res adjudicata* and the decision could not be pleaded or relied upon in any way as a former judgment. It was so held in *State* v. *Wood*, 23 N. J. L. 560, 561, and *Post* v. *Anderson*, 111 N. J. L. 303, 304. There are also decisions by the highest court of New Jersey that an equitable remedy is not ordinarily barred by mere acquiescence for a period less than the statute of limitations at law in a similar case. The tax sale had to be set aside before or contemporaneous with the apportionment and ch. 21 of the laws adopted by New Jersey for the year 1925, p. 77, allows 18 months after a tax sale for the making of application for a writ of *certiorari* to review it. *Meredith* v. *Perth Amboy*, 63 N. J. L. 520, 523 (cited by the Appellate Court in its opinion).

The justices of the State Supreme Court also decided that Sec. 6 of the Apportionment Act included a clause giving

an interested party who did not waive notice the right to apply for a reapportionment on notice (118 N. J. L. 348, 351) and that petitioner should have pursued that course of conduct instead of applying for a writ of *certiorari*. (But see *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333.)

The New Jersey equity cases disclosed that where a tax sale was *void* for any reason, a bill of complaint could be filed in the Court of Chancery of that State to quiet title or to remove the cloud from the title and to have the supposed lien declared void *Welles* v. *Schaffer*, 98 N. J. Eq. 31; *Bogert* v. *Elizabeth*, 27 N. J. Eq. 568; *Kirkpatrick* v. *New Brunswick*, 40 N. J. Eq. 46, affirmed 41 N. J. Eq. 347; *Smith* v. *Cohen*, 123 N. J. Eq. 419; *McClave* v. *Newark*, 31 N. J. Eq. 472, and so a bill of complaint was filed by petitioner in the Trial Court (R. 16 to 44), and a motion was made by counsel for the Township, at the beginning of the trial, to dismiss the bill, but the Trial Court decided that the decision of the justices of the State Supreme Court was discretionary and was not appealable nor a final judgment nor *res adjudicata* (R. 96), and although the attention of the Trial Court had been directed to cases holding that where a lien on real estate was void for any reason, *laches* is not a bar to relief where the lien was imposed under a law repugnant to the "due process of law" section of the Fourteenth Amendment to the Constitution of the United States. *Mitsch* v. *Riverside*, 86 N. J. L. 603, 610, it held in its final decision that petitioner was barred by *laches*.

The bill of complaint so filed in the Trial Court, alleged, *inter alia*, that the Apportionment Act was unconstitutional in that it provided "that an apportionment may be made without notice to the interested parties" and that "no notice of the intended apportionment was given to petitioner or waived by it, either before or after the apportionment was made, except the sending of amended tax bills to petitioner

nine months after it had been made" (R. 29, 30). No part of the Constitution of New Jersey contains the "due process of law" clause contained in the Fourteenth Amendment to the Constitution of the United States (*Abendroth* v. *N. Y. Elevated R. Co.*, 54 N. Y. Super. Ct. 417; and *Maxwell* v. *Goetchius*, 40 N. J. L. 391). During the trial the question of the constitutionality of the Apportionment Act was argued before the Trial Court (R. 161) and it was argued again in the brief submitted on behalf of petitioner to the Trial Court. No oral argument was made by counsel before the Trial Court after the trial. Besides these arguments, counsel for the Township placed before the Trial Court printed copies of the state of the case, supplemental state of the case and the briefs on both sides that had been submitted to the justices of the State Supreme Court in the proceedings had there (R. 82, *LL.* 3 to 6), and on pages 5 to 7 of the brief thus submitted on behalf of petitioner Sec. 6 of the Apportionment Act was quoted and the "due process of law" section of the Constitution of the United States was quoted as the first point for argument in the brief, so that the Trial Court was made fully aware that we claimed that the constitutional insufficiency of the Apportionment Act under the 14th Amendment of the Constitution of the United States had been violated and was attacked. The answer to the question in the brief for the Township was that it was "purely academic". In deciding the case, the Trial Court held that the petitioner alleged in its bill unfair apportionment and unconstitutionality of the Apportionment Act of 1919, under which the apportionment had been made, but that petitioner was guilty of such *laches* in seeking relief and its failure to prove the fraud compelled a dismissal of its bill, and that being so it was unnecessary to pass upon the unconstitutionality of the act (R. 70 to 74).

The Trial Court fell into error when it failed to decide the constitutional question, for it was necessary to set aside the tax sale before or contemporaneous with the setting aside of the apportionment because petitioner could not proceed with a reapportionment while the tax sale stood, and petitioner had obtained the rule to show cause aforesaid from the chief justice of New Jersey on March 11, 1937, within 18 months after the tax sale, which was held on September 12, 1935, and it is well settled in New Jersey that when a bill of complaint is filed for the enforcement of a legal right the equitable remedy is not ordinarily barred by a mere acquiescence for a period less than the statutory limitation of law in a similar case *Massie* v. *Asbestos Brake Co.*, 95 N. J. Eq. 298; 311; *Paterson* v. *East Jersey Water Co.*, 74 N. J. Eq. 49, 97, affirmed 77 N. J. Eq. 588, and where the act under which the assessment is made is unconstitutional a limitation cannot be imposed for bringing *certiorari*. *Meredith* v. *Perth Amboy*, 63 N. J. L. 520, 521.

From the final decree of the Trial Court, filed March 23, 1939, an appeal was taken to the Appellate court (by Sec. 111 of Comp. Stat. 450), and the petition of appeal (Sub-Sec. C of Par. 3 of Sec. 2 thereof), R. 9, stated, *inter alia*, that the bill of complaint filed in said Trial Court alleged "that Ch. 121 of the Laws adopted by the State of New Jersey for the year 1919 was unconstitutional because Sec. 6 thereof provides that such apportionment may be made without notice to the interested parties", and Sub-Sec. (d), in the same paragraph and section (R. 9), stated that the bill of complaint filed in said Trial Court alleged that the Apportionment Act was unconstitutional for the following, among other reasons: Because Sec. 1 of Article 14 of the Constitution of the United States which provides that "No state shall deprive any person of life, liberty or property

without due process of law"; "i. e., said act provides for apportionment of taxes without notice to the parties in interest given either before or after apportionment". There was no oral argument by counsel in the Appellate Court and the brief filed on behalf of petitioner with the judges of that court also contained timely and proper reference to said constitutional question, and a citation of most of the cases herein on the subject (see pp. 4 and 9 of Brief), but the decision of that court affirmed the decree entered in the Trial Court and held that the dismissal of the bill was discretionary, and did not decide the constitutional question aforesaid. It showed, however, that the constitutional question had been considered by it and it held, in effect, that it was not necessary to decide the question because the Trial Court had properly dismissed petitioner's bill; so although the petitioner raised the constitutional question timely and properly in three courts of New Jersey, none of them have decided it.

Sub-section (d) of the petition of appeal (R. 9) charges that the Apportionment Act is in derogation of Sec. 1 of the 14th Amendment to the Constitution of the United States, and quotes the "due process of Law" clause therefrom.

This case having been decided upon non-Federal grounds involving the application of State statutes, it is for this Court to determine whether such application has fair and substantial support or whether it was done for the purpose of evading its jurisdiction. *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540, 543. This Court has indicated that even if the non-Federal ground of decision is based solely upon the construction of a State statute which has no fair or substantial basis, and, in effect, amounts to an attempt to evade this Court's jurisdiction, it will not be bound by such construction. *Knights of Pythias* v. *Meyer*,

265 U. S. 30, 38; *Superior Water, Light & Power Co.* v. *Superior*, 263 U. S. 125, 136.

This Court in deciding the case of the *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux, et al.*, 279 U. S. 737, 744 and 745, said "the right thus specially set up in the State court is a Federal right. Whether it was denied or not given due recognition by the challenged decree, as aforesaid, is a question on which the defeated claimants are entitled to invoke the judgment of this Court, as is done in their petition for *certiorari*. • • • What we have said of the facts demonstrates, as we think, not only that there was obvious and long continued *laches* on the part of the white order, but also that the circumstances were such that its *laches* barred it from asserting an exclusive right, or seeking equitable relief, as against the negro order.

Cases believed to sustain the jurisdiction of the Supreme Court of the United States are: *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 425; *Security Co.* v. *Lexington*, 203 U. S. 323, 333; *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190; *C. M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418, 457, 458; 12 *Corp. Jur.* 1228 and 1229.

Respectfully submitted,

CLARENCE KELSEY,
*Counsel for Petitioner.*

Appended hereto, and headed Appendix A, Appendix B and Appendix C, are copies of the opinions delivered upon the rendering of the decree sought to be reviewed, and of the opinions filed in the Trial Court and in the State Supreme Court in deciding the case.

## APPENDIX "A".

### (Opinion by New Jersey Court of Errors and Appeals.)

New Jersey Court of Errors and Appeals No. 219. October Term, 1939.

Between

LUCKENBACH TERMINALS, INC., a Body Corporate, Complainant-Appellant,

and

THE TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, COUNTY OF HUDSON, NEW JERSEY JUNCTION RAILROAD COMPANY and THE NEW YORK CENTRAL RAILROAD COMPANY, Defendants-Respondents

Submitted October Term, 1939; decided January 25, 1940.

On appeal from a decree advised by Vice Chancellor Kays, whose opinion is reported in 125 N. J. Eq. 562.

For the appellant: Clarence Kelsey.

For the respondent, Township of North Bergen: Nicholas S. Schloeder.

For the respondent, County of Hudson: Robert H. Doherty.

For the respondents, New Jersey Junction Railroad Company and The New York Central Railroad Company: Wall, Haight, Carey & Hartpence.

The opinion of the court was delivered by

HEHER, *J.*

"The essential question here involved is the validity of the tax and assessment apportionment and the proceedings culminating in the tax sale.

So far as is disclosed by the opinion of Mr. Justice Case, the only question raised before and considered by the Supreme Court in the certiorari proceedings was "whether the taxes and assessments were apportioned in a manner unfair" to appellant here. *Luckenbach Terminals, Inc.* v. *Township of North Bergen,* 118 N. J. L. 348. But the con-

stitutional sufficiency of the statute under which the apportionment was had (Chapter 121 of the Laws of 1919, p. 285, as amended by Chapter 335 of the Laws of 1933, p. 879), and the fundamental validity of the apportionment proceeding itself, were also legal questions cognizable on certiorari. As regards these matters, therefore, there was an adequate remedy at law. *Mitsch* v. *Township of Riverside*, 86 N. J. L. 603; *Walsh* v. *Newark*, 78 N. J. L. 168; *Groel* v. *Newark*, 78 N. J. L. 142; *Meredith* v. *Perth Amboy*, 63 N. J. L. 520; *State* v. *City of Hudson*, 29 N. J. L. 475; *Kirkpatrick* v. *Commissioners*, 42 N. J. L. 510; *State, Weart, Pros.*, v. *Jersey City*, 41 N. J. L. 510; *Pardee* v. *Perth Amboy*, 57 N. J. L. 106; *State, Evans, Pros.*, v. *North Bergen*, 39 N. J. L. 456.

Evidently, as observed by the learned vice chancellor, the incorporation in the bill of complaint herein of the allegations (paragraph 40½) that the apportionment was made by the governing body of the respondent township "with the corrupt design of saving" the County of Hudson "from payment of a large amount of taxes under its • • • agreement" with appellant, "and to exact from" appellant "an unjust amount of taxes" on the plot in question, and that "the amount of taxes sought to be imposed" on said plot, "by said apportionment, was so grossly excessive as to be inconsistent with an exercise of honest judgment", was designed to invoke equitable jurisdiction. But the proofs are utterly devoid of any semblance of support for these allegations; and, in these circumstances, the Chancellor was justified in refusing to entertain jurisdiction of the subject-matter of the bill. In the absence of fraud or other special equity, the validity of a proceeding such as this is fully cognizable at law; and the fact that the party seeking equitable relief has delayed the assertion of his claimed right so long that he is barred from relief at law does not *per se* operate to invest equity with jurisdiction to award a remedy. *Mitchell* v. *Pychlau*, 105 N. J. Eq. 524; *Mackie* v. *Cain*, 92 N. J. Eq. 631; *Roe* v. *Mayor and Aldermen of Jersey City*, 79 N. J. Eq. 645; *Goodwin* v. *Millville*, 75 N. J. Eq. 270; *Jersey City* v. *Lembeck*, 31 N. J. Eq. 255; 21 C. J. 47.

There is no occasion for the application of the principle, grounded in the propriety of avoiding a multiplicity of suits, that when a court of equity has jurisdiction of a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all matters at issue. The allegation of fraud was not proved. It is not necessary to deny jurisdiction in this situation; it suffices to say that Chancery was justified in declining jurisdiction. The rule invoked is permissive rather than peremptory in its operation; the assumption of jurisdiction in such circumstances rests largely in the sound discretion of the Chancellor. *Brown* v. *Edsall*, 9 N. J. Eq. 256; *Little* v. *Cooper*, 10 N. J. Eq. 273; *Carlisle* v. *Cooper*, 21 N. J. Eq. 576; *Collier* v. *Collier*, 33 A. 193; *Mayor and Aldermen of Jersey City* v. *Gardner*, 33 N. J. Eq. 622; *Lodor* v. *McGovern*, 48 N. J. Eq. 275; *Hubatka* v. *Maierhoefer*, 65 A. 1002; *Stout* v. *Phoenix Assurance Co. of London*, 65 N. J. Eq. 566, 573; *Shaw* v. *Beaumont Company*, 88 N. J. Eq. 333; 21 C. J. 137, 140, 143. The fact that appellant now asserts an invasion of his constitutional rights does not oblige Chancery to entertain jurisdiction. As stated, such ground of invalidity was cognizable in the certiorari proceedings, and there was therefore an adequate remedy at law in this respect. A special equity cannot be made to rest upon the failure to raise the question in those proceedings. Compare *Vaughn* v. *Johnson*, 9 N. J. Eq. 173.

The circumstances that, in the exercise of its discretionary judgment, the Supreme Court denied appellant's application for the allowance of a writ of certiorari, and that no appeal lies from that determination, does not constitute either a special equity or the want of an adequate remedy at law. *Williams* v. *Audubon*, 96 N. J. Eq. 459. The denial of the application for the writ was not grounded in the hypothesis that it was not an appropriate and available remedy under the circumstances presented, but rather that on the merits appellant was not entitled to relief. The claim of "unfair" apportionment had not been sustained. As to whether laches and estoppel may bar relief in a case involving constitutional deficiency, see *Meredith* v. *Perth Amboy, supra.*

Decree affirmed."

## APPENDIX "B".

*(Opinion by Court of Chancery of New Jersey.)*

Opinion of Kays, V. C.

Dated—March 23, 1939.

Messrs. Kelsey & Ludwig, solicitors for complainant.

Mr. Nicholas S. Schloeder, solicitor for defendant, Town of North Bergen.

Mr. Robert H. Doherty, solicitor for defendant, County of Hudson.

Messrs. Wall, Haight, Carey & Hartpence, solicitors for defendants, New Jersey Junction Railroad Company and The New York Central Railroad Company.

KAYS, V. C.:

"The bill in this case was filed by the complainant, a taxpayer, against the Township of North Bergen, the County of Hudson, the New Jersey Junction Railroad Company and The New York Central Railroad Company presumably for the purpose of quieting title to certain lands claimed by the complainant. The bill deals with a tract of land in the Township of North Bergen along the Hudson River and is described as Plot 4-AB in Block 438-C. The bill prays that the Township and County be restrained from enforcing a tax sale and the apportionment of said land, on the ground that the apportionment and tax assessments are fraudulent, *ultra vires*, illegal and void. Complainant owned land adjacent to the Hudson River in said Township as well as a strip of ripa lands. Bordering on the ripa lands is a highway known as the Hoboken and Hudson River Turnpike. West of the turnpike and about parallel thereto are located the tracks and right-of-way of the New Jersey Junction Railroad Company, which railroad is operated by The New York Central Railroad Company, as lessee.

The County of Hudson made certain improvements to the turnpike and in this connection eliminated two railroad grade crossings. This required certain changes in the alignment of the highway and thereby increased the amount

of complainant's lands. However, it encroached upon complainant's ripa lands.

As a result of these changes certain conveyances were made between the parties in accordance with an agreement entered into between the complainant and the railroad companies. The Township was not a party to this agreement. The County Engineer of Hudson had some informal arrangement with Mr. Stefferson, counsel and secretary of the complainant. They worked out a plan satisfactory to both. Under this plan the County was to reimburse the complainant its cost of acquiring from the State of New Jersey a new strip of land along its ripa lands which was to be eventually taken over as part of the railroad bed as relocated. The County was to assume payment of taxes due on that portion of the old ripa lands which were to be transferred to the railroad company. The lands affected by those proceedings were then described on the tax records of the Township as "Lot 4-A, in Block 438-C".

On July 5, 1933 the Board of Commissioners of the Township adopted a resolution to apportion the tax liens for the years 1930 to 1933 inclusive against the land in question. By this resolution the former plot was described as "Lot 4-AA, in Block 438-C" and as "Lot 4-AB, in Block 438-C". It does not appear, however, that the tax map of the municipality was changed to show the outlines and dimensions of these new apportionments. Mr. Stefferson, however, who carried on the negotiations for the complainant was notified by the County Engineer of Hudson County in December, 1933 that the apportionment had been made. He also told Mr. Stefferson that complainant would not be required to pay taxes on the property transferred, as such taxes would be paid by the County.

The conveyances above referred to were made in March and April, 1934. Complainant received three separate sets of tax bills covering the lands in question and other properties belonging to complainant for the years 1930 to 1933 inclusive. The first set of bills covered Lot 4-AA and Lot 4-AB, in Block 438-C. Another set of bills which were receipted contained assessments on Lot 4-AA in Block 438-C covering the years 1930 to 1932 inclusive and the first half of 1933. The bill for the second half of 1933 for said lot

was cancelled by resolution of the Township. A third set of bills for the year 1933 against Lot 4-AB, in Block 438-C was submitted to the complainant and bore a rubber stamp as follows: "Apportioned by Resolution Board of Commissioners, Jul. 5-1933, Corrected Bill."

Mr. Stefferson submitted at least some of these bills to the attorneys for the railroad company. He testified that he paid no particular attention to the assessment covering Lot 4-AA although he admitted that he did not understand them and made some effort to ascertain what properties they covered. Subsequently he turned over all these bills to the Treasurer of the complainant. Mr. Stefferson made no inquiry of the tax assessor as to what property was covered by Lot 4-AB which was assessed for $496,000.00, the tax on which was $26,000.00 per year. A letter, telephone call or personal call on the tax assessor would have immediately disclosed what property was included in Lot 4-AB. Nothing was done by complainant until April, 1936 when the matter was placed in the hands of Kelsey and Ludwig of Jersey City in connection with some matters of tax on personal property. In the meantime the Township had sold the property at tax sale on September 12, 1935 for nonpayment of taxes. The property at the tax sale was bid in by the Township.

In March, 1937 the complainant here, applied to the Chief Justice for a writ of certiorari to review the apportionment on the ground that it was unfair. The application was denied. An application for the writ was renewed before the Supreme Court and again denied as far as the assessment, tax and apportionment of the lot in question is concerned. See *Luckenbach Terminals* v. *Township of North Bergen*, 118 N. J. L. 348.

The bill of complaint which was filed September 13, 1937 alleges unfair apportionment, unconstitutionality of the Act, Chapter 121, P. L. 1919, under which the apportionment was made, and fraud on the part of the municipality. The proper method to attack the apportionment is by certiorari. It is well settled in this State that the review of such proceedings by a municipal body, is by certiorari, in the absence of special equities or acts ultra vires. The Supreme Court refused the writ to review the matters of assessment,

tax and apportionment. This Court is now asked to determine those same questions. The bill evidently was intended to give this court jurisdiction by the insertion of paragraph 40½ as the other allegations of the bill appear to set up matters which had been argued before the Supreme Court.

I find nothing in the evidence which establishes a so-called corrupt design on the part of the municipality or the County. The Supreme Court on the same facts expressed the view that the complainant was in grave laches. As above stated, the Supreme Court is the proper tribunal to review the proceedings which it has already refused to do. That being so, this court cannot now in the absence of proof of special equities review them. Even if this court could review such procedure, it seems to me, as was apparent to the Supreme Court, the complainant is in laches. The inquiry relative to the assessment was not pursued with diligence. Courts are loathe to interfere with the collection of public revenues. In order that this court may interfere, a party must bring his case strictly within the bounds of equity jurisprudence. Such party must promptly seek his remedy. Complainant's failure to prove fraud or "corrupt design" and its laches in seeking relief compels a dismissal of the bill. This being so it is not necessary to pass upon the constitutionality of the act."

## APPENDIX "C".

### (Opinion by New Jersey Supreme Court.)

### NEW JERSEY SUPREME COURT.

Before Justices Lloyd, Case and Donges.

For the prosecutor, Kelsey & Ludwig (Clarence Kelsey).
For the township of North Bergen, Nicholas S. Schloeder.
For the county of Hudson, Robert H. Doherty.

The opinion of the court was delivered by

CASE, *J.*:

Prosecutor seeks a writ of certiorari to review the apportionment of certain taxes and assessments, and also the proceedings leading up to and including the sale, on September 12th, 1935, of some of the affected lands for taxes for the years 1930 to 1934, inclusive. The underlying ques-

tion is whether the taxes and assessments were apportioned in a manner unfair to prosecutor.

The lands are in the township of North Bergen, county of Hudson, a part bordering and the remaining part near to the Hudson River. Prosecutor owned certain of the upland and also a strip of the ripa made valuable by the right, which attached thereto, to purchase from the State of New Jersey the contiguous underwater land. At the water's edge was the ripa owned by prosecutor. Bordering thereon was the highway known as the Hoboken and Hudson River Turnpike. Next beyond the highway, and parallel therewith, was the New Jersey Junction Railroad Company, operated by the New York Central Railroad Company as lessee. Still beyond and abutting the railroad lands were the prosecutor's uplands. Traffic conditions made it desirable to build a new and modern highway and to eliminate two railroad crossings by reversing the relative locations of the highway and the railroad and, for further efficiency, to shift the turnpike and the railroad some feet easterly, that is, towards the river. That shift increased the acreage of the prosecutor's uplands but encroached upon its ripa. The ends were amicably attained by the exchange of deeds and the making of money payments in accordance with an agreement entered into between the parties. The result was that prosecutor obtained additional ripa land (carrying, of course, an added quota of riparian rights) from the state board of commerce and navigation at a cost of $5,000 (which, however, was reimbursed to prosecutor by the county of Hudson), received the further sum of $60,000.00 in cash and a credit of $4,350.09 on account of arrears in taxes, payment of which was assumed by the county of Hudson; in return for which prosecutor conveyed to the county and the railroad company the rights of way and easements necessary for their purposes, retaining, however, a five-foot fringe of ripa along the river and also specifically reserving all riparian rights incident to any of the lands or rights of way conveyed out; and prosecutor made a payment of $500.00 to the railroad company. The reason for the purchase from the state board of commerce and navigation was that at that point the high water

mark, for reasons that do not appear, had moved appreciably eastward, that is, in the river direction, and the state had, or claimed to have, title to the accretion. The rights of way granted by the prosecutor to the railroad company extended from south to north along approximately three-fifths of prosecutor's ripa lands. The conveyance to the county seems to have no substantial bearing upon present issues. In July, 1933, the taxes were apportioned on the basis of the new holdings. Prosecutor's ripa lands had been assessed at $505,000. On July 5th, 1933, the assessed valuation was apportioned $9,000 to that part of the tract to be occupied by the railroad company and $496,000 to the portion retained by the prosecutor. The contention of the prosecutor is that the entire assessment, that is to say, $505,000 should have been apportioned upon the basis of lineal footage, viz., three-fifths to the railroad company and two-fifths to the prosecutor. That argument, in our opinion, is without substance. The great value of the assessed lands lies, not in the right of way conveyed to the railroad company, but the riparian rights which go with the land binding on the high water line. Not only did the prosecutor retain title to the ripa in the area calculated by it to be two-fifths of the whole, wherein it conveyed no rights whatever, but it retained unencumbered title to a five-foot strip along the water front of the remainder of the tract, as well as title to the fee in so much of that remainder as constituted a right of way to the railroad company. Not only that, but it obligated the railroad company to permit the latter's name to be used by prosecutor as claimant to the riparian rights if and when that should become necessary in order to obtain for prosecutor the conveyance to it of all the underwater lands.

It appears to us that, upon the showing made, the apportionment was not unfair to prosecutor.

But aside from that we are of the opinion that prosecutor is estopped by its laches from obtaining the desired review by writ of certiorari other than as hereinafter allowed. The apportionment for the years 1930 to 1933, inclusive, was made in July of 1933. Prosecutor contends that it was not given the preliminary notice of that apportionment required by the statute; but it admits that it received knowl-

edge of the apportionment in April, 1934, at or immediately after the transfers of title, at which time the prosecutor received receipted duplicates of the tax bills (amended in accordance with the apportionment) which the county of Hudson was, by the agreement, obliged to pay. Prosecutor also received at that time amended tax bills, corrected in accordance with the apportionment, for the taxes which were due from it. Neither then nor at any other time did it seek a reapportionment as permitted by the statute: "Such apportionment may be made without notice to the interested parties, but in such case any interested party who did not waive notice may apply for a reapportionment on notice * * *." Pamph. L. 1919, ch. 121, Sec. 6.

When prosecutor should have acted to correct the alleged error, it did nothing. It remained quiescent while the changes and improvements, including the building of a modern highway past its lands, were concluded and while, and for a long time after, the township concluded its proceedings for the sale for unpaid taxes; indeed until March, 1937, when application for a writ of certiorari was made. That it may not do. Conf. *Hillside Land Co.* v. *North Bergen*, 112 N. J. L. 576; affirmed, 114 Id. 156. It is in laches, gross laches.

It is, however, conceded, that there was an overcharge of $1,000 in the interest calculated on the plot 7B tax. Respondents say on their brief that the municipal authorities have offered to correct the error; but the error remains uncorrected. While we may assume that the township stands ready to do as suggested and that the prosecutor may, if it chooses, obtain that correction without further delay or expense, nevertheless prosecutor seems to be entitled to a writ to review the sale based upon the erroneous interest calculation. *Rellstab* v. *Belmar*, 58 N. J. L. 489; *Caulfield* v. *Jersey City*, 1 N. J. Mis. R. 573. We are unable to determine, from the proofs before us, the precise situs of plot 7B, or whether the sale of that plot was separate from or embodied in the sale of the remaining parcels. But the writ will go as to that plot alone and to the sale thereof, not to the assessment, the tax or the apportionment. No costs are allowed on this application.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939.

No. 115...

LUCKENBACH TERMINALS, INC., a corporation of the State of New Jersey,

*Appellant,*

v.

TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, a municipal corporation of the State of New Jersey, NEW JERSEY JUNCTION RAILROAD COMPANY, a corporation of New Jersey, THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation, COUNTY OF HUDSON, a municipal corporation of the State of New Jersey,

*Appellees.*

APPEAL FROM NEW JERSEY COURT OF ERRORS AND APPEALS.

## *BRIEF IN OPPOSITION TO THE MOTION MADE BY THE APPELLEE TOWNSHIP OF NORTH BERGEN TO DISMISS THE APPEAL OR TO AFFIRM THE DECREE.*

CLARENCE KELSEY,
*Counsel for Appellant.*

The Court Press, 150 Bay St., Jersey City, N. J.

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APPEAL FROM NEW JERSEY COURT OF ERRORS AND APPEALS.

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## *BRIEF IN OPPOSITION TO THE MOTION MADE BY THE APPELLEE TOWNSHIP OF NORTH BERGEN TO DISMISS THE APPEAL OR TO AFFIRM THE DECREE.*

---

### I.

### Status of Case.

The application to the Supreme Court of the United States for allowance of an appeal in this case was made on April 11, 1940, to the chief justice of New Jersey, and

he refused because the remittitur had before that date gone down from the highest court in the state to the trial court and he said he was without power. Application next was made, on April 13, 1940, to Mr. Justice Roberts, who, after he had conferred with one of the other Justices of the Supreme Court, declined to allow the appeal. On April 19, 1940, an application was made to Mr. Justice Frankfurter who allowed the appeal.

The appeal is from a final decree rendered in the New Jersey court of errors and appeals in the last resort in all causes on January 25, 1940, and from each and every part thereof, but the record and proceedings having the same day been remitted to the court of chancery of New Jersey, the clerk of that court was ordered to prepare, certify and transmit the record to the Supreme Court of the United States within forty days of April 19, 1940.

The original papers were, on April 19, 1940, served upon Edward L. Whelan, the clerk of the court of chancery of New Jersey, and left with him, and copies were served upon the attorneys of the appellees in the state courts, including copies of the statement directing attention to the provisions of paragraph 3 of Rule 12 of the Supreme Court of the United States, all by April 24, 1940.

On May 3, 1940, a *praecipe* for the transcript of the record was served upon the attorneys for the appellees, and the original was filed on that day with the clerk of the court of chancery of New Jersey.

On May 7, 1940, a statement against the jurisdiction of this Court, including a motion to dismiss or affirm was served upon me, by the appellee Township, and I am to file this brief in opposition to the motion thus made (Rule 7, par. 3).

## II.

### Unconstitutionality of Apportionment Act.

Manifestly, the statute of New Jersey, which we have called the Apportionment Act (Laws of New Jersey of 1919, ch. 121, p. 285 to 289, as amended by ch. 335 of the Laws of New Jersey for the year 1933, p. 879) is unconstitutional, because of a clause in section 6 thereof, *"that apportionments may be made without notice to the interested parties."* (Italics supplied.) (See pp. 1 and 2 of Statement as to Jurisdiction) and without notice given, either before or after the apportionment has been made.

*Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190; *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418, 457, 458; *Davidson* v. *New Orleans*, 96 U. S. 105. In *Stuart* v. *Palmer*, 74 N. Y. 183, 186, 188, held "The law requires no notice, and a provision for notice cannot be implied." 12 Corp. Jur. 1228 and 1229. And some of the cases in New Jersey, holding the same rule, are: *Mitsch* v. *Riverside*, 86 N. J. L. 603; *Clark Thread Co.* v. *Kearny*, 55 N. J. L. 50; *Grocl* v. *Newark*, 78 N. J. L. 142; *Van Solinger* v. *Harrison*, 39 N. J. L. 51.

It is unconstitutional because repugnant to Sec. 1 of the 14th Amendment to the Constitution of the United States, which reads in part as follows:

> "Nor shall any state deprive any person of life, liberty or property without due process of law."

The bill of complaint of the appellant filed in the court of chancery of New Jersey also attacked the tax sale of the lands of the appellant based on said apportionment,

and prayed that the apportionment and tax sale and certificate of tax sale be set aside and for an injunction restraining the Township from enforcing the tax sale or apportionment, and that they be declared fraudulent, *ultra vires*, illegal and void and that the title of the complainant be quieted against the lien of the certificate of tax sale asserted by the Township (R. 16 to 35).

## III.

## The Federal Question Was Timely and Properly Raised.

On March 11, 1937, the appellant made application to the New Jersey supreme court, on affidavits and exhibits, for a writ of *certiorari* to review the apportionment of taxes of July 5, 1933, and the tax sale of September 12, 1935, founded thereon, and was granted a rule to show cause. The apportionment could not be set aside while the tax sale stood, so the tax sale first had to be set aside or the apportionment and tax sale be set aside together. The action in the state common-law court was brought to set aside both the tax sale and apportionment. In accordance with the state statute of limitation, this was done within eighteen months after the tax sale and so within time according to state law:

> "If the application for the writ and rule to show cause were made within the eighteen months limitation, the statute is considered as fulfilled. When the rule comes to argument, it always relates back to the time it was granted."
>
> *Stevens* v. *Enders*, 13 N. J. L. 271.

The question is whether any notice is provided for by the statute (*Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333).

The grounds advanced for granting the *certiorari*, were that they were "unconstitutional", in that the apportionment was contrary to Sec. 1 of Article 14 of the Constitution of the United States, which provides, *inter alia*, "Nor shall any state deprive any person of life, liberty or property without due process of law", and also unconstitutional by the State Constitution, and that the application was founded on about twelve other good and valid grounds.

The federal ground of "unconstitutionality" could not very well be set forth in the affidavits or exhibits used in making the application for the writ and therefore it appears in the brief filed by the applicant with that court. This same course was adopted in *People ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 68, 69.

SUBMITTED TO THE STATE SUPREME COURT.

Under the first point, on pages 5 to 7 of the brief, the following appears: "The statute of 1919 providing for apportionments and reapportionments of taxes is unconstitutional. • • • Chapter 121 of the Laws of New Jersey for the year 1919 • • • is unconstitutional. Section 6 of this statute provides in part:

> "Such apportionment may be made without notice to the interested parties, but in such case any interested party who did not waive notice may apply for a reapportionment on notice; and Section 1 of Article 14 of the Constitution of the United States provides, *inter alia*, 'Nor shall any state deprive any person of life, liberty or property, without due process of law'."

In *Reeves* v. *Jones*, 74 N. J. L. 330, it was held that:

> "No question of laches is involved upon the issuance of a writ of *certiorari* at any time during the period prescribed by the statute."

In deciding the application, the state supreme court wholly disregarded the claims of the applicant that the statute of 1919 was unconstitutional, and held that the applicant was guilty of *laches* in making its application (118 N. J. L. 348, 350) and said that "on July 5, 1933, the taxes were apportioned on the basis of the new holdings," which would be impossible as the opinion shows that such new holdings were not acquired until April, 1934, nearly nine months after the apportionment. We say "impossible", because the illegal Act of 1919 provides in its fourth section (p. 2 of Statement as to Jurisdiction) that:

> "4. The apportionment shall be made according to the value of the respective subdivisions at the time the respective charges were levied or imposed, unless the claim is justly chargeable only to a particular part of said parcel,"

and the preceding Act for apportionment of taxes was sec. 31 of the *General Tax Act* of 1903 (P. L. 1903, ch. 308, p. 394), which was repealed by the *General Tax Act* of 1918, but provided, in said sec. 31, "that taxes may be apportioned among proper subdivisions of such parcel * * * according to the values of the respective subdivisions at the time the tax became due, * * * the tax on each subdivision shall be a lien thereon in the same manner as originally assessed."

The opinion of the state supreme court is replete with errors of fact as well as of law and was inapplicable. It says that "the applicant obtained additional ripa land", which is not so, and retained a five-foot fringe of ripa along the river, which is true, but it was not procured or retained until nearly nine months after the apportionment of July 5, 1933. The applicant got the deed conveying the triangular tract of land, dated February 14, 1934, which included the five-foot fringe of ripa (Ex. C, 5,

R. 278 to 287) on March 8, 1934. The opinion further says, that the state claimed title to the accretion. There was no accretion for the state to claim title to and they made no claim to any. Then the opinion goes on to treat the lands as though the applicant, at the time of the apportionment, had already made the changes, but, they were, in fact, made about nine months *after* the apportionment. We find that the applicant went to the railroad companies in October, 1933, four months after the apportionment, and made an entire new deal (R. 163, 164). In fact, down to the time of the change in March, 1934, the applicant knew nothing about an apportionment of its lands having been made (R. 164) and did not learn the result of the apportionment until February, 1937.

And the court finished its opinion by saying that "it appears to us that, upon the showing made, the apportionment was not unfair to applicant." The opinion holds that it was not until April, 1934, that applicant received knowledge of the apportionment—nearly nine months after the actual apportionment—by receiving amended tax bills, but it did not seek a reapportionment provided by Sec. 6 of the 1919 act, and see Sec. 9 of the Apportionment Act of 1919 (Statement as to Jurisdiction, 2) which requires a deposit of a sum sufficient to pay the estimate apportionable to the sub-division in which the applicant is interested. The application for a *certiorari* as to this riparian plot was refused, and although the highest court of the state held, as to the effect of refusing a writ of certiorari, in *State* v. *Wood*, 23 N. J. L. 560, 561.

> "that where the state supreme court refuses to grant the writ the decision rests in the discretion of the court and cannot, in any technical or appropriate sense, be denominated *final*. There the court refused to take cognizance of a matter in controversy, and

> they decided not to examine the questions of law arising between the parties; they passed no definite sentence and settled no right. The court further said that 'the matter in controversy cannot be said to be *res adjudicata;* the decision of the court cannot be pleaded, nor relied upon in any way, as a former judgment and the question at issue may be again agitated before the same or a coordinate tribunal. * * * There is a wide and obvious distinction, which no argument can render more clear, between the refusal to entertain a cause, and the rendering of a final judgment upon the matter at issue."

A reference to the following cases, reported in New Jersey, showed that a bill in chancery would lie in such a case:

*Bogert* v. *Elizabeth*, 27 N. J. Eq. 568; *Kirkpatrick* v. *New Brunswick*, 40 N. J. Eq. 46 (affirmed 41 N. J. Eq. 347); *Smith* v. *Cohen*, 123 N. J. Eq. 419; *Commercial Co.* v. *Southern Surety Co.*, 100 N. J. Eq. 92 (affirmed 101 N. J. Eq. 738).

In *Welles* v. *Schaffer*, 98 N. J. Eq. 31, 33, Vice-Chancellor Backus held that an attack on a certificate of tax sale, if the certificate is voidable, must be made by *certiorari;* if it is void, by ejectment, bill to remove the cloud or bill to quiet title.

Paragraph 31 of the bill of complaint filed in the court of chancery, September 13, 1937 (R. 29) avers that said act (of 1919) is unconstitutional for the following reasons, among others; "It also provides that an apportionment may be made without notice to the interested parties". And paragraph 32 of the bill avers that "no notice of said apportionment was given to the complainant, or waived by it, either before or after said apportionment was made, and

complainant had no knowledge of the results thereof until the discovery on said February 25, 1937, of the said certified copy of resolution, Exhibit G" (R. 29, 30).

The above allegation that "It also provides that an apportionment may be made without notice to the interested parties", referred to the "due process of law clause" in the Federal Constitution, because the State Constitution does not contain a clause like the "due process of law clause" in the Federal Constitution (*Abendroth* v. *N. Y. Elev. R. Co.*, 54 N. Y. Supr. Ct. 417; *Maxwell* v. *Goetschius*, 40 N. J. L. 391), and page 30 of the typewritten brief filed with the trial court on behalf of complainant is under the following heading:

> "Said apportionment was made under the provisions of Chapter 121 of the Laws of New Jersey for the year 1919, entitled 'An act for the apportionment of assessments for taxes and other municipal assessments, charges or liens', approved April 11, 1919, as amended by chapter 335 of the Laws of New Jersey for the year 1933; and said Acts are unconstitutional; and said apportionment was made without notice to the complainant;" (See *Gibes* v. *Zimmerman*, 290 U. S. 326, 328.)

And on page 29 of the brief filed with the trial court, under said heading, appears the statement, "We also contend said Apportionment Act, chapter 121 of the laws of 1919, is unconstitutional because it provides, in Section 6 thereof, that such apportionment can be made without notice to the interested parties" and again on page 30 of the brief, under said heading, appears the averment that "Section 1 of Article 14 of the Constitution of the United States provides, *inter alia*, 'Nor shall any State deprive any person of life, liberty or property, without due process of law' ".

No oral argument was allowed at the conclusion of the hearing and the final argument was made by brief only.

There was offered to the vice-chancellor, in the course of the argument to dismiss the bill, made at the beginning of the trial, the record of the case in the supreme court and the briefs filed in that case, and he received them (R. 82); and the claim was made by the complainant during the trial that the statute of 1919, constituting the Apportionment Act, was unconstitutional, during which argument the solicitor for the Township said, "That argument was considered and the matter decided adversely" (R. 161). He must have meant only that the charge of unconstitutionality had been "considered by the state supreme court and by that court decided adversely". The records of the state supreme court and the briefs therein filed were not printed with the record which went with the appeal from the court of chancery to the court of errors and appeals.

In deciding the case, the vice-chancellor said (R. 70 to 74) that the bill of complaint alleged "unfair apportionment, unconstitutionality of the Act, Ch. 121, P. L. 1919, under which the apportionment was made, and fraud on the part of the municipality. • • • Complainant's failure to prove fraud or 'corrupt design' and its laches in seeking relief compels a dismissal of the bill. This being so, it is not necessary to pass upon the constitutionality of the act;" and he dismissed the bill of complaint (R. 74).

In their answers filed in the court of chancery, both defendants, the Township and County, alleged that "notice of such apportionment was given to the complainant in April, 1934" (R. 48, par. 23; 56, par. 23; and 49, par. 41).

The petition of appeal to the court of errors and ap-

peals specifies, as a ground of appeal, that the decree of the court of chancery of New Jersey is erroneous in that it adjudges that complainant's bill of complaint be dismissed, whereas said bill avers, that "The statute under which said apportionment was made is chapter 121 of the Laws of New Jersey for the year 1919 (P. L. 1919, p. 285) entitled 'An Act for the apportionment of assessments for taxes and other municipal assessments, charges or liens', as amended by chapter 335 of the Laws of New Jersey for the year 1933, and the defendants admitted at the trial that said apportionment was made under said laws" (R. 29), and that the bill alleges that said act of 1919 is unconstitutional for the following among other reasons:

> "(d) It is in derogation of Section 1 of Article 14 of the Constitution of the United States, which provides that no state shall deprive any person of life liberty or property without due process of law, *i. e.*, said Act provides for apportionment without notice to the parties in interest being given either before or after apportionment" (R. 8 and 9).

The instant case in the appellate court was not argued orally but was submitted on brief. By Rule 9 of the court of errors and appeals, adopted at the February term, 1932, it is provided that all causes properly noticed and listed will be submitted on brief unless counsel give notice otherwise; except appeals or writs of error in all manslaughter or murder cases which shall be argued orally.

The brief on behalf of the appellant (at p. 4) said:

> "I also claim that said statute of 1919, in providing that an apportionment can be made without notice to the interested parties, is repugnant to that part of Section 1 of the 14th Amendment to the Constitution

of the United States which provides: 'Nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law'."

Under the heading on page 38:

"The apportionment of the taxes against Plot 4 A, Block 438 C, and the Tax Sale founded thereon, are unconstitutional, ultra vires, illegal and void for the Following Reasons:

(A) Because the statute under which said apportionment was made is unconstitutional.

Sub-division (A) reads:

"Said apportionment was made under the provisions of Chapter 121 of the Laws of New Jersey for the year 1919, entitled 'An Act for the Apportionment of assessment for taxes and other municipal assessments, charges or liens', approved April 11, 1919, as amended by Chapter 335 of the Laws of the year 1933; and said laws are unconstitutional and said apportionment was made without notice to the appellant".

The brief, further considering the constitutional question, says (at p. 42):

"I also contend said Apportionment Act, Chapter 121 of the laws of 1919, is unconstitutional because it provides, in Section 6 thereof, that *'such apportionment may be made without notice to the interested parties'*."

"If the foregoing is the law it would appear that without notice to or knowledge by an owner, his lands can be subdivided for purposes of taxation, and that assessments of taxes already levied against them can be apportioned without his knowledge or consent in such way that one

subdivision will be re-assessed by the apportionment for more than it should bear while the other subdivision is thereby released from a greater part of the burden, and that, no matter how long a time intervenes between the apportionment and knowledge thereof gained by the owner of a subdivision, and no matter to what extent he has been wronged by the apportionment, in order to obtain a reapportionment he must, by Section 9 of the Apportionment Act, if the governing body of the municipality requires it, deposit with his application various sums of money including sufficient to pay the estimated amount of taxes apportionable to the subdivision in which he is interested. As to how and by whom this estimated amount is to be determined at the time the application for a reapportionment is filed, the statute is silent; and why an owner who has been wronged by an unfair apportionment should be compelled to pay his taxes, sooner than he otherwise would be required to, as a condition to obtaining a just reapportionment, is not disclosed."

"Section 1 of Article 14 of the Constitution of the United States provides, *inter alia*, 'Nor shall any State deprive any person of life, liberty or property, without due process of law.'"

"Section 12 of Section 7 of Article 4 of the Constitution of New Jersey, as amended, provides that 'Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value'."

"Section 31 of the General Tax Act of 1903 (P. L. 1903, Chap. 208, p. 394), required a notice to be given all owners of a parcel of land of a proposed apportionment of taxes assessed against it."

"Manifestly this statute of 1919 is upon its face unconstitutional, and the attempted apportionment in the instant case, based thereon, is illegal and should be set aside. Our bill alleges, in paragraph 32 thereof, and the resolu-

tion (Exhibit C-8, pp. 309-310) passed on July 5, 1933 by the Commissioners of North Bergen, and the testimony of Mr. Mewhinney (p. 140) and of Mr. Stefferson (pp. 145 and 146), show that no notice of the proposed apportionment was given to or waived by the appellant, and that it was attempted and intended by said apportionment to deprive the complainant of its property without due process of law."

"The act fails to provide for notice to the landowner, and, indeed, it provides by section 6 thereof, that apportionments may be made without notice to the parties in interest."

*Corpus Juris* has this to say about such an act (vol. 12, pp. 1228 and 1229):

> "Where boards or commissioners act in a judicial or *quasi*-judicial capacity, notice is necessary to render their order due process of law. The law authorizing the proceedings must require notice or it will be unconstitutional. It is not enough that a person may by chance have notice, or that he may, as a matter of favor or courtesy, have a hearing. • • • Under this view the statute is not unconstitutional unless it undertakes to dispense with notice. Other cases hold that the statute itself must specifically require notice, or otherwise it authorizes proceedings without notice, and is therefore unconstitutional."

Note 27 to the above quoted text cites the case of *Stuart* v. *Palmer*, 74 N. Y. 183, which holds (at p. 186):

> "The law requires no notice, and a provision for notice can not be implied".

and (at p. 188):

> "I am of the opinion that the constitution sanctions no law imposing such an assessment, without a

notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by a chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it but what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

Another case cited in *Corpus Juris* is *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, in which Mr. Justice Pitney wrote the opinion of the court, and said (at pp. 422 and 423):

> "Thus construed, and as applied in this case, we think section 2677 is repugnant to the 'due process of law' provision of the Fourteenth Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation; and in our opinion the other sections do not adequately supply the defect."

and (at p. 425):

> "Thus in *Security Trust Co.* v. *Lexington*, 203 U. S. 323-333, the court, by Mr. Justice Peckham, said with respect to an assessment for back taxes:
>
> 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed asessment. It is not what notice, un-

> called for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute.'"

In *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, it was held that:

> "An act giving the commonwealth the power, without notice or hearing, to command a railway company to abolish a grade crossing and construct an overhead is unconstitutional as repugnant to section 1 of the Fourteenth Amendment" (Cites 134 U. S., 418 and 457-458).

The case of *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418 (at pp. 457-458), the court, in holding an act unconstitutional, said:

> "It deprives the company of its right to a judicial investigation by due process of law, under the form and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes, therefor, as an absolute finality, the action of a railroad commission which, in view of the power conceded to it, by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice".

It was held in *Davidson* v. *New Orleans*, 96 U. S. 105, and in other cases which followed it, that:

> "When a law provides a mode for confirmation or contesting an assessment for taxation, with appropriate notice to the person charged, the assessment cannot be said to deprive the owner of his property without due process of law",

and the defendants will argue here, in reply, that section 6 of the Apportionment Act provides that:

> "In such case (an apportionment without notice) any interested party who did not waive notice may apply for a reapportionment on notice",

and that the appellant did not make an application for a reapportionment, and, therefore, cannot complain. But it will be noticed that by section 9 of said Apportionment Act it is further provided that:

> "Any such governing body or authorized officer *may* refuse to comply with any application for apportionment or reapportionment, unless the written application shall be accompanied by a map showing the entire parcel and the sub-divisions desired, and shall also be accompanied by the deposit of a sum sufficient to cover the expense of the notice and advertisement hereinbefore provided, and to pay the estimated amount apportionable to the subdivision in which the applicant is interested".

## IV.

## Consideration of Brief of Appellee.

The motion to dismiss or affirm, made by the appellee, does not clearly state the facts on which it is based, as required by Rule 7, paragraph 1.

It also states facts not of record, *i. e.* depth of water, etc.

The appellee says on this motion (See its brief, pp. 4 and 11) that a new suit was brought by it in the court of chancery of New Jersey since the decision herein by the appellate court, to foreclose the rights of the appellant in the property in question, and other property,

and that on April 8, 1940, a motion was made in behalf of the complainant in that suit to strike out the answer filed by the appellant (here), and that the appeal to the Supreme Court of the United States is manifestly taken for delay only.

The appellant says in answer that it decided back in the month of last January to make application for an appeal to the Supreme Court of the United States, and made such intention known also to the solicitors of the appellees on February 26, 1940, when the appellee moved to make the decree of remittitur of the appellate court the decree of the court of chancery, and the vice-chancellor was then asked to grant a stay pending such appeal if allowed.

But the foreclosure suit had already been commenced by the filing of a bill on February 24, 1940, which sought to foreclose not only the premises sold at the tax sale on September 12, 1935, but the valuable new ripa as well *which has never been sold for taxes* and which the solicitor of the appellee admitted having included in his bill of complaint, averring that a detailed description of the property sold by the collector of taxes included the northerly two-fifths part of the riparian tract and the five foot wide riparian fringe acquired from the state nine months after the apportionment. And, added to the description, the following appears: "Together with such rights as the Luckenbach Terminals, Inc., may have in lands under water adjoining the aforementioned tract, together with such rights as the Luckenbach Terminals, Inc., may have conveyed to the New Jersey Junction Railroad and The New York Central Railroad and to the County of Hudson.

Being also known as Lot 4 A. B. in Block 438 C on the Township Assessment Map of the Township of North Bergen in the County of Hudson."

On April 22, 1940, during the argument of a motion to strike the answer filed by the appellant in that suit, the charge was made that the solicitor of the appellee Township knew, when he filed the bill for the appellee, that the ripa acquired in April, 1934, had not been sold for taxes; and he admitted that he included that plot in the bill because he thought it should be included or something to that effect.

Because the foreclosure suit was a new suit and between other parties than those in the instant case, I refrained from mentioning these facts in any of the papers heretofore filed herein, but now that the appellee has brought it in, I am compelled to mention it. On February 24, 1940, when the bill was filed in the foreclosure suit, the solicitor for the appellee could not have known of my intention to try to get a review of the present case in the Supreme Court of the United States, and he now claims in his brief that the appeal to Washingon is "manifestly taken for delay only". The value of the real estate involved in this foreclosure suit, including the parcels attempted to be foreclosed, which were never sold for taxes, amounts to about one million dollars, and a bill filed to foreclose the equity of redemption after a tax sale is fatal if it includes more lands than were sold at the tax sale. (*Welles* v. *Schaffer*, 98 N. J. Eq. 34.)

The appellee, Township, in its brief filed on the motion to dismiss or affirm, does not say that the federal question of "due process of law" was not timely or properly raised in the state courts, but practically admits that the state courts decided the case on independent and non-federal grounds adequate to support their decision; but the appellant says that the appellee has failed to show that any of the non-federal grounds upon which the decisions of the state courts rest are tenable or broad enough to

support their decision, or that they have a fair or substantial basis.

The refusal of the state supreme court to grant the writ of *certiorari* was discretionary, non-appealable, not *res adjudicata* nor a final decision, and could not be quoted by another court as a decision. *State* v. *Wood*, 23 N. J. L. 560, 561, 562; *Post* v. *Anderson*, 111 N. J. L. 303, 304.

But both the court of chancery and the court of errors and appeals not only quoted from the decision of the state supreme court but followed it in deciding the case, and held that the appellant was guilty of such *laches* as to be unable to maintain its case, whereas the case in the state supreme court was instituted within the statutory time of eighteen months after the tax sale; and the court of chancery and court of errors and appeals decided that fraud had not been found in the case, whereas it appeared, and still does appear, that the whole riparian tract in the township was apportioned so that the southerly three-fifths part thereof was reassessed at $9,000, and the northerly two-fifths part at $496,000 per year, the apportionment thereby increasing the assessment from $202,000 to $496,000 per year on the northerly two-fifths part, and decreasing the assessment from $303,000 to $9,000 per year on the southerly three-fifths part.

The case of *State* v. *Wood*, 23 N. J. L. 560, 561, was decided in 1847, and has never been overruled, and it recently has been in part approved by our highest state court in *Post* v. *Anderson*, 111 N. J. L. 303.

In the opinion of the state supreme court (118 N. J. L. 348, 350) it is said:

> "In July, 1933, the taxes were apportioned on the basis of the new holdings. Applicant's ripa lands had been assessed at $505,000. On July 5,

1933, the assessed valuation was apportioned, $9000. to that part of the tract to be occupied by the railroad company, and $496,000. to the portion retained by the applicant. The contention of the applicant is that the entire assessment of $505,000. should have been apportioned upon the basis of lineal frontage, viz, three-fifths to the railroad company, and two-fifths to the applicant. • • • That the apportionment for the years 1930 to 1933, inclusive, was made in July, 1933, • • • and applicant received knowledge of the apportionment in April, 1934, at or immediately after the transfer of titles."

The triangular shaped piece conveyed by the State of New Jersey to the appellant on March 8th, 1934 (conveyance dated February 14, 1934, R. 278 to 287) is shown as bounded by red lines (R. 287), and the same day that it received the conveyance from the State, it conveyed to the railroad companies "a permanent and perpetual easement and right of way for the construction, maintenance and operation of the railroad" in all parts thereof but a strip five feet wide and 635 feet long on the riverward or easterly side, which it retained in order to preserve to itself the thing of value in the entire holding, namely, the preferential right to obtain a grant or lease from the state of the submerged land contiguous thereto (R. 241 to 255). This reservation is shown in the deed on page 248 of the record. These facts were admitted at the trial. So how could the state supreme court say that the apportionment of taxes on July 5, 1933, were on the basis of the new holdings acquired nine months later? Section 4 of the unconstitutional apportionment act provides that:

> "4. That the apportionment shall be made according to the value of the respective subdivisions at the time the respective charges were levied or imposed,

unless the claim is justly chargeable only to a particular part of such parcel."

This *riparian* right, on July 5, 1933, had cost the appellant at least $800,000 in addition to the taxes paid thereon from the year 1920 to 1929, inclusive, but the state court of first instance said nothing in its opinion about the constitutionality of the apportionment act of 1919, although the first point in the brief submitted to that court for the appellant contained a quotation of the "due process of law" clause as set forth in Section 1 of the Fourteenth Amendment to the Constitution of the United States, and a claim that the act was unconstitutional because Section 6 thereof provided that "apportionments may be made without notice to interested parties".

The conveyance of the additional triangular shaped tract by the State of New Jersey on March 8, 1934, could not have been and was not taken into consideration in apportioning the taxes for the years 1930 to 1933, for as we have shown at the foot of page 7 of our "Statement as to Jurisdiction", lands owned by the state are not subject to taxation, and under the prevailing *General Tax Act* (Laws of N. J. for 1918, Ch. 236, Section 501, page 862) this land after it was acquired from the state could not be assessed until October 1, 1934, for the taxes for the year 1935. So, they were not included in the apportionment of July 5, 1933, upon which the tax sale is based.

And referring to the case, quoted on page 3 of our "Statement as to Jurisdiction", of *Security Trust Co.* v. *Lexington*, 203 U. S. 325, 333, we say that part of the opinion of the state supreme court which holds, at page 351, that the appellant should have sought a reapportion-

ment under Section 6 of the Apportionment Act of 1919, does not conform thereto; in which respect the state supreme court fell into error, but an error not reviewable.

## V.

### Alleged Other Tenable Grounds Did Not Exist.

Then again, the question of *laches*, decided by the state supreme court, at page 351 of its opinion: It is clear that a tax sale having intervened on September 12, 1935, at which the two-fifths northerly part of the riparian lands, retained by the appellant after the apportionment, was sold, nothing could be done after that about a reapportionment until the tax sale was reopened, for while the tax sale stood, there could be no reapportionment. As a general principle, *laches* is not a bar where a tax is assessed in violation of constitutional rights, or if the tax is otherwise a void lien, *Mitsch* v. *Riverside*, 86 N. J. L. 603, 610; *Walsh* v. *Newark*, 78 N. J. L. 168, 170; and *Meredith* v. *Perth Amboy*, 63 N. J. L. 520, 522, the last-cited case holding that:

> "This statutory limitation of eighteen months upon the allowance of a prerogative writ cannot be enforced for the protection of an assessment which the legislature could not constitutionally authorize."

And by the law of the state, appellant was within time in bringing the action in the state supreme Court, for the rule to show cause why a *certiorari* should not be granted was made on March 11, 1937, and within the eighteen months succeeding the tax sale as required by Section 14 of "An Act relative to the Writ of *Certiorari*" (Vol. 1 Compiled Stat. 407, as amended by P. L. of 1925, p. 77). (See last page of this brief.)

As to the charge of fraud: The fact remains that the southerly three-fifths part of the 1,010 feet in length of ripa that was apportioned stands assessed by the apportionment for $9,000 per year while the northerly two-fifths part is assessed by the apportionment for $496,000 per year, and we say that is fraud which was calculated to take over one hundred thousand dollars out of appellant's pocket at least inherent fraud. Surely no apportionment act should be so construed that it will enable the person or persons appointed to make the apportionment to increase or decrease the assessed valuations so that an assessment of $500 per foot of frontage on the shore of the two-fifths part is increased from $202,000 to $496,000 per year, while the apportionment of $500 per foot of frontage on the shore of the remaining three-fifths part is decreased from $303,000 to $9,000 per year, unless there was something in the value of the respective prices which was not present here. When the taxes were assessed the value of $500 per foot was there.

The charge that the court of chancery of New Jersey did not have jurisdiction to hear the case, because the appellant here had an adequate remedy at law by certeriori in the state supreme court, and that a municipality, in assessing, levying and apportioning taxes, is within the province of a court of law. In the suit in the lower courts, when the appellant was turned away from the state supreme court, it sought help from the only other available court, the court of chancery of New Jersey, where among the other relief prayed was that the Township be restrained from enforcing the illegal tax sale and apportionment. There were also charges of unconstitutionality in the Apportionment Act, fraud and concealment in the making of the apportionment, over which subjects the court of chancery had jurisdiction. The decision of Vice-Chancellor Backes in *Commercial Co.* v.

*Southern Surety Co.*, 100 N. J. Eq. 92 (affirmed in 101 N. J. Eq. 738) shows that where the jurisdiction of courts of law and equity for the redress of fraud is concurrent, the court of equity should retain jurisdiction in cases where the remedy at law is not as complete as in equity. Cases are cited in the opinion where the courts of chancery retained jurisdiction because of its power of cancellation of an instrument and to grant an injunction. The bill of complaint filed in the court of chancery contained all the allegations necessary in a bill to quiet title under the "Act for Quieting Titles" of March 2, 1870 (4 Compiled Stat. 5399, Sec. 1) and may be said to be a bill *quia timet* as well. *Smith* v. *Cohen*, 123 N. J. Eq. 419. In *Welles* v. *Schaeffer*, 98 N. J. Eq. 31, 33, Vice-Chancellor Backes held that an attack on a certificate of tax sale, if void, is by bill to remove the cloud or bill to quiet title, or, if voidable, by *certiorari*.

The Township and County, appellees, have assumed the position throughout that the commissioners of the township had the right on July 5, 1933, to make the apportionment based on what might *thereafter* occur, and a further proposition that they had the right to disregard the annual assessment of taxes levied for the years 1930 to 1933 against the ripa lot, 4-A, and reduce the annual assessment against the southerly three-fifths part that might be conveyed to the railroad company, from a valuation of $500 a foot to $14 a foot of frontage per year, and add the difference of $291,000 of valuation per year to the two-fifths part that might be retained by the appellant, just because it might retain the rights at some future time to acquire the submerged lands lying in front of the two-fifths part. Such an apportionment was illegal and void, and the court of chancery had the jurisdiction to set it and the tax sale based thereon aside.

*Bogert* v. *Elizabeth*, 27 N. J. Eq. 568; *Kirkpatrick* v. *New Brunswick*, 40 N. J. Eq. 46, affirmed 41 N. J. Eq. 347; *Smith* v. *Cohen*, 123 N. J. Eq. 419; *Commercial Co.* v. *Southern Surety Co.*, 100 N. J. Eq. 92, affirmed 101 N. J. Eq. 738.

The taxes for the year 1930 to 1933, inclusive, on this whole ripa tract, 4-A, were high and were based on the preferential right existing throughout each of those years in the owner to acquire from the State the adjacent lands under water. They were assessed, as the Exhibits B, C, D and E attached to the bill show (R., pp. 38, 39), according to the frontage of 1,010 feet on the River at $500 per foot a year. The fact that nine months after the making of the apportionment of July 5, 1933, the appellant acquired a new high water line from the State upon which its preferential right would thereafter depend could not be taken into consideration, for, in making its conveyance to the railroad companies, the appellant would convey an easement rather than the fee and would reserve its *riparian* rights for which, and the acreage of land in the rear, it had paid $1,750,000 in the year 1920. (See $1,750 of cancelled revenue stamps attached to deed Ex. 11, R., pp. 312 to 318.)

Given a tract of vacant land of equal length, breadth and value throughout, how could a municipality honestly apportion unpaid taxes thereon other than in accordance with the length of the respective parcels into which it was to be divided. The Apportionment Act of 1919, even if it is not constitutional, provides in its fourth section, that:

> "4. That the apportionment shall be made according to the value of the respective subdivisions at the time the respective charges were levied or imposed, unless the claim is justly chargeable only to a particular part of such parcel."

The two-fifths part of this ripa plot retained by the appellant gained no increase in value and the claim that about all but $9,000 of said taxes of $505,000 per year assessed against all of said plot could be chargeable only to that part of it retained by the appellant, known after the apportionment as Plot 4-AB, is preposterous.

In *Fitzgerald* v. *Faunce*, 46 N. J. L. 536, it was held by the court of errors and appeals of New Jersey, in giving consideration to a grant of an easement for the exclusive use of lands "It is a grant of the soil itself and not a mere easement, as it is difficult to understand how the exclusive use could be demised and the land not."

This brings us to a consideration of the charge (on p. 2 of the Appellee's Brief) that they did not make the admission, charged on page 6 of the statement as to jurisdiction filed by the appellant. But a reference to the record will show that they did so admit.—I turn to page 104 of the Record, and there find under heading of "stipulations", which I read to the court (20th line) that "paragraphs 24, 25 and 26 (of the bill) are admitted. 27, 28 and 29 are denied", and it appears in the next line, that Mr. Schloeder said to the court "If the court please, again there, we simply refer to the instruments. He draws conclusions from the instruments, and the instrument of course we admit".

Turning to page 6 of the Statement as to Jurisdiction, I find the part quoted by counsel of the appellee Township, and an examination of Exhibit G (pp. 42 and 43 of the Record), shows the resolution for the apportionment adopted and signed, on July 5, 1933, by three of the township commissioners, apportioning $9,000 per year to the southerly three-fifths part of the plot 4-A, Block 438-C, and known as 4-AA in Block 438-C, and $496,000 per year to the northerly two-fifths of plot 4-A or 4-AB,

in Block 438-C. In making up the Statement as to the Jurisdiction, of course, we did not pretend to quote the facts from the testimony as recorded and so had to condense them. Said Exhibit G proved the allegations of paragraph 28 of the bill (R. 108). Mr. Schloeder said on the argument, made and reiterated before trial, to strike the bill of complaint, that "practically everything can be stipulated except this allegation of fraud" (R. 100). But the paragraph which follows and says, "that the three state tribunals who passed on the question had determined the challenged statement to be without substance", is a fiction, for taking the first, the state supreme court (118 N. J. L. 348 to 352), says (on p. 350):

> "Prosecutors ripa lands had been assessed at $505,000. On July 5, 1933, the assessed valuation was apportioned $9,000 to that part of the tract to be occupied by the railroad company and $496,000 to the portion retained by the prosecutor. The contention of the prosecutor is that the entire assessment, that is to say, $505,000 should have been apportioned upon the basis of the lineal frontage, viz., three-fifths to the railroad company and two-fifths to the prosecutor."

The second court to pass on the question, the court of chancery (Opinion, R. 70 to 74) from which it appears that before the apportionment the ripa tract was known as Plot 4-A, in Block 438-C, which by the apportionment was divided into two pieces, known as the Lot 4-AA, in Block 438-C, and Lot 4-AB, in Block 438-C, * * * (p. 72) and that 4-AB was thereafter assessed at $496,000; and it does not say what it found was assessed by the apportionment on lot 4-AA, but it must have been the remainder, of $9,000.

The third court was the court of errors and appeals, and an examination of its opinion fails to disclose any

reference therein as to the riparian lot which was apportioned (Appendix A to Statement as to Jurisdiction).

As to appendix "A", annexed to appellee's Statement in Opposition, is attached what purports to be all of the testimony of the township assessor, but it takes in only his direct examination, the cross-examination is left out. However, his testimony amounts to saying that he assessed $16,000 for the land, a length of 1,010 feet (p. 239) and a width of 5 to 8 feet, and $496,000 for the ripa rights, but that in 1932 after the State Board of Taxation had reduced the total assessment from $757,500, on the whole of plot 4-A, to $500 per foot, he followed the assessment so made by the State Board. His testimony is contradicted by all the other evidence in the case.

When the amended tax bills were made out, after the apportionment, the bills for 1930 to 1933, inclusive, were dated back and show what this last witness testified to, not an allocation of $16,000 on land for one piece and $496,000 for ripa, but $9,000 for the southerly three-fifths part known as plot 4-AA (R. 366, 367) and $496,000 for the northerly two-fifths part known as plot 4-AB (R. 368, 369). What was the apportionment made for but to divide the unpaid taxes that appeared against the ripa plot on July 5, 1933? It was not to determine, as now claimed by the appellee, how much should be assessed against the land and how much against the ripa.

The next paragraph of the motion (Statement against Jurisdiction, p. 7) to dismiss the appeal states that the appellant retained "all of the valuable riparian rights in the lands constituting approximately 98% of the easement". The efforts of the appellee Township have been to deprive the appellant of its valuable riparian lands, which cost it, in 1920, over $800,000 and since then about $200,000 expended on account of a lease from the state of the lands under water (R. 346 to 355) and hundreds of thousands for taxes, which land it was

not willing to give away to a railroad company and a county. The appellants did not make any agreements in writing with the railroad company or county, but lived up to its verbal agreement and expected them to do likewise.

The acquirement in 1934, after the apportionment was made, of the triangular shaped tract of submerged land, was put through not to help the appellant in any way, but because the railroad company needed a new roadbed 54 feet wide, and it was planned by the county engineer, including a new five foot riparian fringe which, of course, would give the appellant an inferior position in respect to acquiring submerged lands, for even this five feet wide riparian fringe was taken by the railroad for slopes and embankments of their road bed (R. 245, 246).

The Apportionment Act of 1919 is unconstitutional and provides by its fourth section (Statement of Jurisdiction, p. 2) that:

> "The apportionment shall be made according to the value of the respective sub-divisions at the time the respective charges were levied or imposed, unless the claim is justly chargeable only to a particular part of such parcel."

and Chapter 208 of the *General Tax Act* of New Jersey of 1903, provides in Section 31, "that in making apportionments the lands shall be assessed in accordance with the value thereof when the taxes came due". The taxes for 1930 to 1933, inclusive, were past due and unpaid when the County made its verbal agreement and the appellant expected it to live up to the agreement. The $65,000 paid by the County to the appellant was for the damage arising from the change of grade, as shown by the unsigned letter submitted by it to the appellant (R. 338, 339).

Answering the contention, set forth in the last paragraph on page 3 of the adversary's brief, we have to say that the Apportionment Act of 1919, being unconstitutional, the appellant was not obliged to seek recourse to the reapportionment provided by it (*Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333) but had the right to treat it as unconstitutional. The appellant says that if the appellant had been treated honestly and fairly by the Township-Appellee there would have been no trouble. The sale for taxes, of September 12, 1935, amounting to $172,856.59 against plot 4-AB should have been for about $65,000 and for the additional five years, since 1934, about $115,000 more, a total to 1939, inclusive, of $180,000 instead of $376,177.77 as stated on page 4 of opposing brief.

The failure of the appellant to take advantage of the alleged remedy afforded by Sections 6 and 7 of the Apportionment Act is that that Act is unconstitutional, and it did not require that any notice should be given a taxpayer of an apportionment.

The cases quoted by the appellee, namely, *Farncomb* v. *Denver*, 252 U. S. 7; *Pittsburgh* v. *Board of Public Works*, 172 U. S. 32; *Weyerhaueser* v. *Minnesota*, 176 U. S. 550, and *Utley* v. *St. Petersburgh*, 292 U. S. 106; are all based on some law which required a taxpayer or interested party to have notice, before or after the final determination of the amount which had to be paid, so that he could be heard, but that is one reason why the unconstitutional Apportionment Act in the instant case should be condemned.

On page 9 of his brief, the adversary says that the taxpayer was afforded a full and complete hearing upon the merits in the state supreme court, but there again is a question of difference, for the taxpayer says that after the argument, on Saturday, May 1, 1937, of the rule to

show cause before the chief justice, the rule to show cause was denied, but without prejudice to an application to be made to the second branch of the court at Trenton, on May 4, 1937, and the state of the case and brief had to be printed by that time and notice of the argument given, and the argument was heard on May 6, 1937, and in the short time of one-half an hour given to argue the taxpayers' side, the court could not have understood the case. In receiving the brief submitted by my adversary, I find that he says, at page 2 thereof, that the riparian rights which go with the ownership of a ripa consist of a right, upon payment to the state, to fill in the submerged lands in front of the ripa, and that such right was valued in the instant case at $500,000, but I call the Court's attention that the right is more extensive, and that upon a grant of submerged lands by the state to a riparian owner he becomes the owner of the fee to the land lying under water with the enjoyment of same as any other owner of land; and I have yet to see any explanation of why a Township should take such a deep interest in these lands. It can make no difference to the Township what property owners seek to do with their lands or what contracts they make regarding it so long as they keep within the law.

I have made answer to all the points raised. No notice was given the taxpayer in the present case either before or after the apportionment that its lands had been apportioned, and that is where the vice of this unconstitutional act lies, and as the secretary of the appellant taxpayer testified in the suit in the court of chancery: "That 4-AB meant nothing to me as I did not know what 4-AB meant, and although I tried to find out, I was unable to do so" (R. 185). One bill, out of the fifty-two offered into evidence, was stamped "Appor-

tioned by the Board of Commissioners, July 5, 1933. Corrected bill" (R. 175), but the witness testified that the dates 1930, 1931, 1932 and 1933, upon the amended tax bill did not refer to the time they were received by him, but were bills with the old year numbered upon them (R. 184) and when he got bills after the apportionment of 4-AA for $9,000 and of 4-AB for $496,000 he did not know which bill the appellant should pay (R. 185).

The answer to Point B and Point C on pages 4 and 5 of the adversary's brief, is that no notice was called for by the Apportionment Act and appellant had the right to treat it as unconstitutional and not entrust hundreds of thousands of dollars to the township commissioners under Section 9 of that act in order to obtain a reapportionment, and that when appellant learned of the result of the apportionment in February, 1937, there had already been a sale of its lands for taxes.

Point D, on page 5 of the adversary's brief, has already been answered.

When the case of *Moran* v. *Horsky*, 178 U. S. 205, 207, was decided, and even as late as the decision in the case of *Preston* v. *Chicago*, 226 U. S. 447, 450, the Act of December 23, 1914, 38 Stat. 790, of the Judicial Code had not been passed, empowering the Supreme Court to review decisions of state courts sustaining the claim of federal right, in addition to those denying it, but even if that were not so, the *laches* or delay in the *Moran* v. *Horsky* case (*supra*) was fourteen years.

And the same should be said of the decision in *Smith* v. *Adsit*, 83 U. S. 185, and *Pierce Oil Co.* v. *Texas*, 212 U. S. 86, and the cases therein cited.

The taxpayer did not exercise his mandatory right to

have a reapportionment on notice. One reason for its not doing so was that it knew nothing about the apportionment having been made, but if it had known, it would not have exercised the right and paid down a hundred thousand dollars more than it could have been justly taxed.

The appellee has quoted from *Security Trust Co.* v. *Lexington*, 203 U. S. 335, where the taxpayer had a hearing in court before seeking a review in the Supreme Court of the United States and a reduction of about $5,000 had been made in its tax, and therefore it had received all the hearing it was entitled to.

This leaves unconsidered only one case cited by the appellee, namely, *McGregor* v. *Hogan*, 263 U. S. 234, and there the taxpayer had notice.

It is well settled that the jurisdiction of the Supreme Court to review a judgment of a state court, the effect of which is to deny a federal right, cannot be defeated by placing such judgment on non-federal grounds which are plainly untenable.

*Postal Telegraph Cable Co.* v. *Newport, Ky.*, 247 U. S. 464, 475, 476; *Ward* v. *Board of County Commissioners of Love County, Okla.*, 253 U. S. 17, 22; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540; *Ancient Egyptian Arabic Order of the Mystic Shrine* v. *Michaux*, 279 U. S. 737, 745; *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282; *Enterprise Irr. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164; *Love* v. *Griffith*, 266 U. S. 32, 33; *Chicago B. & Q. Ry.* v. *Chicago*, 166 U. S. 226.

The law in New Jersey is clear that when a bill of complaint is filed for the enforcement of a legal right, the equitable remedy is not ordinarily barred by a mere acquiescence for a period less than the statutory limita-

tion of law in a similar case. *Massie* v. *Asbestos Brake Co.*, 95 N. J. Eq. 298, 311; *Paterson* v. *East Jersey Water Co.*, 74 N. J. Eq. 49, 97, affirmed 77 N. J. Eq. 588.

***The motion to dismiss the appeal or to affirm the decree of the New Jersey Court of Errors and Appeals should be denied.***

Respectfully submitted,

CLARENCE KELSEY,
*Counsel for Appellant.*

Dated, May 25, 1940.

FILE COPY

FILED
MAY 29 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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# No. 115

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LUCKENBACH TERMINALS, INC.,
*Appellant,*

*vs.*

TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY.

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APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

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## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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NICHOLAS S. SCHLOEDER,
*Counsel for Appellee, Township of North Bergen.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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# No. 115

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LUCKENBACH TERMINALS, INC., A CORPORATION OF THE STATE OF NEW JERSEY,

*Appellant,*

*vs.*

TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY, NEW JERSEY JUNCTION RAILROAD COMPANY, A CORPORATION OF NEW JERSEY, THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION, AND COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY,

*Appellees.*

## STATEMENT AGAINST THE JURISDICTION OF THE COURT, INCLUDING THEREIN MOTION TO DISMISS OR AFFIRM, BY THE APPELLEE TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON AND STATE OF NEW JERSEY.

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Pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, the appellee hereby makes a statement against the jurisdiction of this court and includes therein a motion to dismiss or affirm.

## Statement of the Case.

Practically all the facts which are necessary to determine the questions here involved are contained in the opinions of the court below, which opinions are annexed to appellant's statement in support of jurisdiction as Appendices A, B and C respectively.

The clearest statement of the facts is contained in the opinion filed in the original suit in the New Jersey Supreme Court, 118 N. J. L. 346, 192 Atl. 740. (Appellant's Appendix C.)

The appellee will therefore rest content with these as to the facts, with a single exception—that it denies that there was any admission of certain allegations as set out on page 6 of the typewritten statement of the appellant which reads as follows:

> "* * * on July 5, 1933, a resolution in writing was adopted by three of the Commissioners apportioning the unpaid taxes upon the Riparian Tract so that the southerly three-fifths part thereof carried a valuation of $9,000.00 per year and the northerly two-fifths part thereof a valuation of $496,000.00 per year, instead of $303,000 per year to the southerly three-fifths part and $202,000.00 per year to the northerly two-fifths part (R. 42, 43; Admitted R. 104, Ex. G)."

This is a gross misstatement and has been determined to be without substance by all three tribunals who passed on the question.

Briefly, the facts concerning this are as follows:

The property in question is a narrow strip of water front property in the New York Harbor in the westerly New Jersey side of the Hudson River 1010 feet in length and averaging only a few feet in depth throughout most of the length, only the northerly part terminating in docks having any substantial depth.

This is amply shown on the numerous sketches. In fact, it contained only about 6/10 of an acre.

Now, as upland it was worth approximately $9,000.00 at the rate of $16,000.00 an acre. But by virtue of certain valuable riparian rights, which went with the ownership of the ripa, the taxpayer had a right upon due payment to the State of New Jersey to fill in some twenty acres of land in front of the ripa. This right was valued at the rate of about $500.00 a front foot, or roughly, $500,000.00.

By the settled law of the State of New Jersey, this right was not assessed separately, but as a part of the assessment on the ripa.

Thus,

> " 'If, on the other hand, the defendants have only a right in the land under water as appurtenant to the land back of the exterior line for solid filling, the value of that right is properly included in an assessment upon the land back of the line.' This ruling has been approved by the Court of Errors and Appeals. 75 Id. 571."
>
> *Long Dock Co.* v. *Board of Equalization*, 87 N. J. L. 22, 23 93 Atl. 111.

As a result of a public improvement undertaken by the County of Hudson, leading to the shifting of a public road and some railroad tracks, the appellant property owner conveyed an easement in the southerly three-fifths of the land but retained all of the valuable riparian rights therein constituting approximately 98% of the easement. See especially Complainant's Exhibit C-2, R. 248.

By the simple device of ignoring the fact that this valuable right remained entirely unaffected as a result of sundry conveyances, the appellant makes the false and specious argument that the three-fifths southerly part so lost was apportioned at $9,000.00, while the remaining two-fifths was saddled with the balance of $496,000.00. Actually, the

$496,000.00 represents the value of the ripa right retained.

Appellee's Appendix A is a copy of the testimony establishing how the assessor arrived at his assessment (R. 234), which testimony remained entirely uncontradicted.

The appellant taxpayer unsuccessfully attacked this apportionment both at law and at equity in the State courts. He did not at any time seek the remedy of reapportionment provided by the statute which he now attacks, as will be more specifically pointed out in the argument.

The appellee likewise desires to call attention to the fact that no taxes have been paid on this parcel of property since 1930 (Appellee's Appendix B, R. 189, 190), and that since this case has been decided the Township of North Bergen has instituted foreclosure proceedings against the appellant on February 24th, 1940, alleging taxes unpaid amounting to $376,177.77 on the premises in question; that thereafter on April 8th, 1940, a motion was made to strike out the answer filed by the said appellant, which, it is respectfully submitted, precipitated the appeal to the United States Supreme Court, which appeal is thus manifestly taken for delay only.

## ARGUMENT.

### Summary of the Argument.

POINT A. The judgment of the State court is based upon (1) laches and estoppel, (2) want of jurisdiction of the Court of Chancery, and (3) failure to prove fraud, a question of fact, all of which do not present a Federal question and are broad enough to sustain the judgment without reference to the Federal question.

POINT B. The admitted failure of the appellant to ask for the administrative remedy afforded by the State statute is alone sufficient to estop it from attacking the constitutionality of such statute.

POINT C. The requirements of the due process clause of the Fourteenth Amendment were amply satisfied in the instant case because (1) the objection is merely addressed to want of notice of the making of an apportionment of a tax levy, although the statute mandatorily provides for reapportionment on notice upon the request of the taxpayer and (2) in the proceedings challenging the apportionment the taxpayer has been given full opportunity to be heard on the question of the validity of the apportionment.

POINT D. It is manifest that the appeal was taken for delay only.

**Point A.**

**The judgment of the State court is based upon (1) Laches and Estoppel, (2) Want of Jurisdiction of the Court of Chancery, and (3) Failure to Prove Fraud, a question of fact, all of which do not present a Federal question and are broad enough to sustain the judgment without reference to the Federal question.**

The three opinions of the State courts, both at law and at equity, amply show that the judgment below was based on laches, want of jurisdiction and failure to prove fraud.

(1) The Court of Chancery says:

> "The Supreme Court on the same facts expressed the view that the complainant was in grave laches. • • • Complainant's failure to prove fraud or 'corrupt design' and its laches in seeking relief compels a dismissal of the bill. This being so it is not necessary to pass upon the constitutionality of the act."

These findings are affirmed by the highest court in the State. These grounds are broad enough to support the judgment of the State court, and, curiously enough, in the instant case, the State court says so itself.

Under the circumstances, the question of laches and estoppel presents no Federal question.

Thus, in *Preston* v. *City of Chicago*, 226 U. S. 447, at page 450 remarks,

> "Even, however, if we were at liberty to disregard the action of the state court and attribute to the plaintiff in error the status claimed by him, as in addition the court below held that the right to the relief prayed was in any event barred by long delay and laches, this would be sufficient to prevent us from reviewing the alleged Federal question. *Moran* v. *Horsky*, 178 U. S. 205, 207."

(2) The question of jurisdiction between the courts of law and equity in New Jersey does not present a Federal question and is conclusive as far as the Supreme Court is concerned. Thus, the court in *Smith* v. *Adsit*, 83 U. S. (16 Wallace) 185, says:

> "As we have seen, the bill was dismissed for want of jurisdiction. The judgment of the court respecting the extent of its equitable jurisdiction is, of course, not reviewable here."

(3) Finally, the question of fraud and fairness of the apportionment are all questions of fact, which are not subject to review here. Thus, in *Water-Pierce Oil Company* v. *Texas*, 212 U. S. 86, at page 97, the court remarks:

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the

findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quinby* v. *Boyd*, 128 U. S. 488; *Egan* v. *Hart*, 165 U. S. 188; *Dower* v. *Richards*, 151 U. S. 658; *Thayer* v. *Spratt*, 189 U. S. 346."

**Point B.**

**The admitted failure of the appellant to ask for administrative remedy afforded by the State statute is alone sufficient to estop it from attacking the constitutionality of such statute.**

As before indicated, the taxpayer wholly failed to take advantage of the administrative remedy afforded by Sections 6 and 7 of the statute under attack.

> Sec. 6. Such apportionment may be made without notice to the interested parties, but in such case any interested party who did not waive notice may apply for a reapportionment on notice; on such reapportionment, if a sum is apportioned to any subdivision in excess of the former apportionment, the amount of such excess shall be abated and lost to the municipality (P. L. 1919, p. 286).
>
> Sec. 7. Notice under the foregoing section shall state the time and place of hearing on such application, and shall be given at least one week in advance by publication in a newspaper in which ordinances of said municipality may be published, and by personal service of a copy of such notice on each person interested who resides in the municipality (P. L. 1919, p. 286).

By reason thereof, the appellant is now estopped from attacking the constitutionality of such statute. This rule is clearly set out in the syllabuses to the following cases.

> "As construed by the Supreme Court of Colorado, §§ 300 and 328 of the charter of the City and County of Denver gave property owners an opportunity to be

heard before the Board of Supervisors respecting the justice and validity of local assessments for public improvements proposed by the Park Commission, and empowered the board itself to determine such complaints before the assessments were made. P. 9.

"Parties who did not avail themselves of such opportunity can not be heard to complain of such assessments as unconstitutional. P. 11. 64 Colorado, 3, affirmed."

*Farncomb* v. *Denver*, 252 U. S. 7.

Again,

"1. A state taxing statute which, although not providing for notice and hearing before the assessment of property by a board of assessors, grants the taxpayer after due notice the right to a hearing before arbitrators, to be selected one by himself, one by the board, and a third by these two, who shall finally assess and fix the valuation of his property, affords him the notice and hearing required by due process of law; and a taxpayer who, being duly notified of the board's assessment, abstains from demanding an arbitration, so that under the statute the assessment becomes final, has no ground for attacking the assessment as unconstitutional. P. 236."

*McGregor* v. *Hogan*, 263 U. S. 234.

**Point C.**

**The requirements of the due process clause of the Fourteenth Amendment were amply satisfied in the instant case because (1) the objection is merely addressed to want of notice of the making of an apportionment of a tax levy, although the statute mandatorily provides for reapportionment on notice upon the request of the taxpayer, and (2) in the proceedings challenging the apportionment the taxpayer has been given full opportunity to be heard on the question of the validity of the apportionment.**

For clarity, I will again repeat the pertinent Section 6 of the statute.

Sec. 6. Such apportionment may be made without notice to the interested parties, but in such case any interested party who did not waive notice may apply for a reapportionment on notice; on such reapportionment, if a sum is apportioned to any subdivision in excess of the former apportionment, the amount of such excess shall be abated and lost to the municipality (P. L. 1919, p. 286).

(1) It is elementary that, if the taxpayer is afforded some hearing before the administrative action is final, at some stage in the proceedings, the requirements of notice as afforded by the "due process" clause have been complied with. *Pittsburgh* v. *Board of Public Works*, 172 U. S. 32; *Weyerhaueser* v. *Minnesota*, 176 U. S. 550; *Security Trust Company* v. *Lexington*, 203 U. S. 323; *Utley* v. *City of St. Petersburg*, 292 U. S. 106.

This applies to general taxes as well as assessments for benefits. Thus, the court in *Pittsburgh* v. *Board of Public Works, supra*, at page 45 said:

> "But it is not important, in this case, to pursue that course of inquiry; since, in matters of taxation, it is sufficient that the party assessed should have an opportunity to be heard, either before a judicial tribunal, or before a board of assessment, at some stage of the proceedings. *Kelly* v. *Pittsburgh*, 104 U. S. 78; *Pittsburgh &c. Railway* v. *Backus*, 154 U. S. 421.
>
> "Even if, therefore, no previous notice of the hearing before the board of public works was required by the statute, or was in fact given to this plaintiff, (which is by no means clear), yet the notice of its decision, with the right to appeal therefrom to the circuit court of the county, and there to be heard and to offer evidence, before the valuation of its property for taxation was finally fixed, afforded the plaintiff all the notice to which it was entitled."

In *Weyerhaeuser* v. *Minnesota, supra,* at page 557, the court said:

> "This court in *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526, quoted the above extract as establishing that the property owner was afforded a hearing by the laws of the State, and declared the rule that the Constitution of the United States was satisfied if an opportunity be given to question the validity or amount of the tax 'either before that amount is determined or in subsequent proceedings for its collection.' "

(2) A further and additional reason for sustaining the action here is that the taxpayer was afforded a full and complete hearing upon the merits in the Supreme Court. This fact is clearly pointed out in the opinion of the New Jersey Court of Errors and Appeals.

Referring to the action in the New Jersey Supreme Court, the Court of Errors and Appeals says:

> "The denial of the application for the writ was not grounded in the hypothesis that it was not an appropriate and available remedy under the circumstances presented, but rather that on the merits appellant was not entitled to relief."

Under the circumstances the following remarks of the Supreme Court of the United States in *Security Trust Company* v. *Lexington, supra,* at page 335, are particularly apposite:

> "We think it sufficiently appears that the plaintiff had an opportunity to be heard upon the question of the validity of the tax, both for want of notice in fact, and whether the property assessed for back taxes had really been omitted from the original list for the years in question, and was therefore properly taxable under the assessment for back taxes. Even if the assessment had been made by the assessor without notice, yet if upon the hearing in this cause the plaintiff had the

right and an opportunity to be heard, and the assessment was thereon reduced, it has obtained all the hearing it was entitled to. We think the plaintiff did have such a hearing, and the judgment is correct, so far at least as this court is authorized to review it. It is therefore Affirmed."

Such cases as *Southern Railroad Company* v. *Virginia*, 290 U. S. 190, and *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, are distinguishable. In the first case, the right to apply for a hearing on the administrative action therein taken was granted only as a matter of favor or discretion. The same was true in the second case, with the added element that the notice itself was merely casual.

In the instant case, on the other hand, the statutory right to get a reapportionment on notice, while it is entirely discretionary with the taxpayer, once he exercises that discretion, it is absolutely mandatory as far as the taxing power is concerned. In fact, it places the risk of loss solely upon the taxing power, when it uses the following language:

> "6. • • • on such reapportionment, if a sum is apportioned to any subdivision in excess of the former apportionment, the amount of such excess shall be abated and lost to the municipality."

**Point D.**

**It is manifest that the appeal was taken for delay only.**

Subsequent to the decision of the highest State court, there was a proceeding instituted in the Court of Chancery of New Jersey by the Township of North Bergen to foreclose the right of the appellant in the property in question alleging that the sum of $376,177.77 was the amount of the tax lien due on said properties.

On April 8th a motion was made to strike out the answer of the appellant filed in the said cause.

On April 11th a petition of appeal was made in the Supreme Court of the United States.

It is manifest that the sole purpose of such appeal is delay.

**Conclusion.**

For the foregoing reasons, the following motion is respectfully submitted for the consideration of the court:

**Motion to Dismiss or to Affirm.**

Comes now the appellee, Township of North Bergen in the County of Hudson, by its counsel appearing in that behalf, and moves the Court to dismiss the appeal in the above-entitled cause for want of jurisdiction, because the judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the highest court of the State, in which the decision in the suit could be had; to wit, the New Jersey Court of Errors and Appeals.

And the said appellee, by counsel as aforesaid, also moves the court to affirm the said judgment or decree from which said appeal purports to have been taken, because although the record in the said cause may show that this Court has jurisdiction in the premises, yet the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and it is manifest that appeal was taken for delay only.

NICHOLAS S. SCHLOEDER,
*Attorney and of Counsel for*
*Appellee Township of North Bergen.*

## APPENDIX "A".

ADOLPH BENTZ, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Schloeder:

Q. What is your position, Mr. Bentz? A. Tax Assessor of the Township of North Bergen.

Q. How long have you been such? A. Six years.

Q. Are you familiar with the values of property down there? A. I am, sir.

Q. As part of your duties, have you assessed this property in question? A. I have.

The Court: Tax Assessor of what?

Mr. Schloeder: The Township of North Bergen.

The Witness: The Township of North Bergen.

Q. Did you assess the property known as 438-c, 4-a, prior to this apportionment? A. Yes, sir.

Q. What was the assessment, do you recall? A. As much as I recall, it was assessed at $750,000, and subsequent to that, the State Board of Taxation reduced it to $500,000.

Q. And as the result of the State Board of Taxation decision, did you again assess the property? A. I did.

Q. At what figure? A. At the decision rendered by the Board.

Q. In assessing that property, could you give us a brief analysis of the amount allocated to the ripa rights and the amount allocated to the land as land?

Mr. Kelsey: I object to it unless his records show it,—and they do not show it.

The Court: I will allow him to answer it.

A. The land value was approximately——

Mr. Kelsey: I object. He is not an expert.

The Court: He did the actual assessing.

Mr. Schloeder: He has testified hundreds of times in court.

Mr. Kelsey: It may have been away back in 1890 that he assessed it, from all that appears here.

The Court: Do you want to cross-examine him?
Mr. Schloeder: He has testified scores of times.
Mr. Kelsey: I object to the witness' testimony.
The Court: I will allow him to answer the question.

A. The land value, approximately $16,000 an acre, and the balance was on the ripa rights.
Q. How much is the balance? A. $496,000.
Q. So that it is divided into the allodial part of land worth $16,000 an acre and $496,000 for the ripa rights; is that right? A. That is the allocation.
Q. How much, then, did you figure for the land? A. Previous to the apportionment?
Q. No. According to this $16,000 an acre you gave us, how much did you figure for the land? A. $9,000.
Q. $9,000. That made a total of what? A. $505,000.

Mr. Schloeder: That is all.

R. 234, 236.

## APPENDIX "B".

Cross examination by Mr. Schloeder:

Q. Was that 1930 tax ever paid? A. I think it was.

Mr. Kelsey: We admit that it was not paid.

A. No.
Q. Were there ever any taxes paid since 1930 on these properties? A. Not on this parcel, no sir.
Q. Nothing? A. No.

Re-direct examination by Mr. Kelsey:

Q. But the year 1930 was paid on some of the other plots. A. On 435-c, lot 7, there was a payment made in 1930.

Re-cross examination by Mr. Schloeder:

Q. Is that the last payment? A. November 19th, 1931, there was a payment made, and the Township waived interest on the payment by resolution of November 16th, 1931. Paid it without interest.

Q. That is on 435. A. Only a partial payment, too.
Q. Is that the last money you ever got from this company? A. Yes, sir.

By Mr. Kelsey:

Q. They paid something over $20,000 at that time, didn't they, Mr. Purdy? A. No, sir, not on those parcels. There was $943.66 interest waived on that payment.
Q. How much was paid? A. $1,056.34.
Q. Is that all that was paid on the 1930 taxes? A. That was all that was paid on the 1930 taxes.

Mr. Kelsey: That is all.

(Witness excused.)

R. 189, 190.

No. 115. LUCKENBACH TERMINALS, INC. *v.* TOWNSHIP OF NORTH BERGEN ET AL. Appeal from the Court of Chancery of New Jersey. October 14, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal

is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. *McCoy* v. *Shaw*, 277 U. S. 302; *Doyle* v. *Atwell*, 261 U. S. 590; *Farson, Son & Co.* v. *Bird*, 248 U. S. 268, 271. *Mr. Clarence Kelsey* for appellant. *Mr. Nicholas S. Schloeder* for North Bergen, and *Mr. John A. Hartpence* for New Jersey Junction R. Co. et al., appellees. Reported below: 125 N. J. Eq. 562; 127 *id.* 93; 6 A. 2d 548; 11 A. 2d 46.